S. HRG. 98-1242

OVERSIGHT OF COLLECTIVE BARGAINING AGREEMENT AND THE BILDISCO DECISION

JOINT HEARING

BEFORE THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES

AND THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

REVIEWING WHAT ADJUSTMENTS ARE NEEDED TO INTEGRATE SUCCESSFULLY THE GOALS OF THE NATIONAL LABOR RELATIONS ACT AND THE BANKRUPTCY CODE

APRIL 10, 1984

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and the Committee on the Judiciary

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OVERSIGHT ON COLLECTIVE BARGAINING AGREEMENTS AND THE BILDISCO DECISION

TUESDAY, APRIL 10, 1984

U.S. Senate,
Committee on Labor and Human Resources
and Committee on the Judiciary,
Washington, DC.

The committees met, pursuant to notice, at 9:30 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin Hatch (chairman of the Committee on Labor and Human Resources) presiding.

Present: Senators Hatch, Thurmond, Nickles, Denton, Dole, Quayle, Grassley, Specter, Biden, Metzenbaum, DeConcini, and Heflin.

The Chairman. Today, the Senate Judiciary and Labor Committees are convening the first Senate hearing on this subject. Although this is the first Senate hearing on this particular topic, rejection of collective-bargaining agreements during bankruptcy reorganization is not a new phenomenon.

The 1978 act preserved preexisting authorities which had permitted such unpleasant but necessary actions to preserve a failing business. Only recently has the perception emerged that in the context of bankruptcies, the collective-bargaining process has broken down. Unions fear that businesses are seeking the refuge of the bankruptcy court in order to avoid the obligations of their labor contracts. Employers, on the other hand, maintain that only cooperation between labor and management can save jobs and that such cooperation is often difficult to obtain, even under the most dire circumstances.

Today's hearings will attempt to assess the reality of these perceptions. From this review, I am hopeful that we can determine what, if any, adjustments are needed to integrate successfully the goals of the National Labor Relations Act and the Bankruptcy Code. Together, these statutory schemes should function to ensure that a unionized debtor can undergo financial rehabilitation in a timely and equitable manner, without really subverting the collective-bargaining process or undermining the ability of a union to fulfill its representative responsibility on behalf of its particular employees.

Subsequent to the scheduling of this hearing, the committee has learned of a memorial service to be held this morning at the Washington Cathedral for the late Senator Frank Church. We certainly express our condolences to his wife and family. He served long and nobly here in the U.S. Senate, and we appreciate that service. We certainly wish to accommodate any Senator who would like to attend this service, but at the same time, we have witnesses who have traveled across the country to testify today, and the deadline for resolving this bankruptcy issue does not leave us time to reschedule this hearing, so I just have to proceed.

Therefore, in the interest of time and in an effort to give Senators an opportunity to question the witnesses before they depart for services, I will just put my opening statement into the record, and I will recommend that other Senators do likewise.

[The opening statement of Senator Hatch and the prepared statements of Senators Thurmond, Riegle, and Denton follow:]

OPENING STATEMENT OF SENATOR HATCH

On February 22 of this year, in the case of *NLRB* v. *Bildisco and Bildisco,* the Supreme Court set standards for rejection of collective bargaining agreements during reorganization proceedings. That significant decision can be broken down into two major components. First, the Court ruled, by a vote of 9 to 0, that collective bargaining agreements are executory contracts subjects to rejection if the debtor can show that the labor contract burdens the estate and that a balancing of the interests of all the parties favors rejection. Second, the Supreme Court decided, by a narrow 5 to 4 margin, that the debtor may unilaterally modify or reject an agreement prior to the bankruptcy court's formal approval. In the words of the Court:

> The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources . . . Thus, the authority to reject an executory contract is vital to the basic purpose of a chapter 11 reorganization because rejections can release the debtor's estate from burdensome obligations that can impede a successful reorganization.

The response to the *Bildisco* decision in the House of Representatives was swift and extreme. Exactly 1 month after the decision was announced, the House approved provisions absolutely barring unilateral rejection of a collective bargaining agreement. Moreover, under the House bill, a debtor could only reject an agreement by persuading a bankruptcy court that it had attempted to develop a complete reorganization plan at the bargaining table before ever coming to court. Once in court, the debtor would have to prove that rejection is the only way to reorganize the business and save union jobs. This would impose burdens on the struggling business more onerous than the most extreme judicial authorities prior to the Court's *Bildisco* decision. I fear that the House approach will produce a supreme irony: It will sweep endangered businesses right past rehabilitation into liquidation. For employees, union and nonunion alike, the House bill seems to promise only lost jobs and benefits. It may preserve a piece of paper called the labor contract, but contracts with a liquidated company offer hollow promises. What is needed here is not a rush to legislative judgment.

Today, the Senate Judiciary and Labor Committees are convening the first Senate hearing on this subject. Although this is the first Senate hearing on this topic, rejection of collective bargaining agreements during a bankruptcy reorganization is not a new phenomenon. The 1978 act preserved preexisting authorities which had permitted such unpleasant, but necessary, actions to preserve a failing business. Only recently has the perception emerged that, in the context of bankruptcies, the collective bargaining process has broken down. Unions fear that businesses are seeking the refuge of a bankruptcy court to avoid the obligations of a labor contract. Employers, on the other hand, maintain that only cooperation between labor and management can save jobs and the business and that such cooperation is often difficult to obtain even in the most dire circumstances.

Today's hearing will attempt to assess the reality of these preceptions. From this review, I am hopeful that we can determine what, if any, adjustments are needed to integrate successfully the goals of the National Labor Relations Act and the Bankruptcy Code. Together, these statutory schemes should function to ensure that a unionized debtor can undergo financial rehabilitation in a timely and equitable manner, without subverting the collective bargaining process or undermining the ability of a union to fulfill its representative responsibility on behalf of employees.

This issue, difficult in isolation, comes to the Senate in a context that adds pressure and complexity to its consideration. It is currently before the Senate as one provision of a bill drafted to correct the constitutional deficiency in the bankruptcy courts' jurisdiction discerned by the Supreme Court in the *Marathon* case (102 S. Ct. 2858 (1982)). Congress is now working under a deadline, already extended, to restore the bankruptcy system to sound constitutional footing. From that perspective, the proceedings of this hearing today may be vital to the viability of the entire bankruptcy process. Thus, these two committees look forward to the constructive recommendations of each of the witnesses today toward a fair and reasonable resolution of the issues surrounding rejection of labor contracts during reorganization.

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE COMMITTEE ON THE JUDICIARY AND THE COMMITTEE ON LABOR AND HUMAN RESOURCES REFERENCE REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY REORGANIZATION PROCEEDINGS. DIRKSEN SENATE OFFICE BUILDING, ROOM SD-430. APRIL 10, 1984. 9:30 a.m.

I am pleased that the Committee on the Judiciary and the Committee on Labor and Human Resources have been able to schedule this joint hearing on the very important issue of rejection of collective bargaining agreements in Chapter 11 reorganization proceedings. This issue has received quite a bit of media attention since the February 22 decision of the Supreme Court in NLRB v. Bildisco & Bildisco. It has also consumed a great deal of time here in the Senate as we have tried to work toward a final solution to the current crisis in our bankruptcy system. Primarily because of this issue, the Senate was unable to agree two weeks ago on a bankruptcy bill to send back to the House and was thus forced to pass a 30-day extension of the present interim system. It is important, therefore, that this hearing be held to assist us in making a reasoned determination regarding what legislative provisions, if any, should be passed in the wake of the Bildisco decision. It is also extremely important that we enact legislation to permanently resolve the constitutional problems in our bankruptcy system. Passage of such legislation to address the needs of our court system is our primary goal and responsibility, and we should not lose sight of that fact.

The Supreme Court, in its Bildisco decision, upheld the right of a debtor-in-possession or a trustee to reject a collective bargaining agreement in a Chapter 11 reorganization case. The Court adopted the "balancing of the equities" standard set out below by the Third Circuit Court of Appeals. In so doing, the Court specifically rejected the more stringent standard which had prevailed in the Second Circuit under the case of Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc. Under REA Express, a debtor essentially had to show that the reorganization would fail unless rejection of the collective bargaining agreement was permitted. The Supreme Court, by a vote of 9 to 0, determined that the REA Express standard was too strict, concluding that it was "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code." Thus, the Supreme Court found a "balancing of the equities" standard to be an appropriate middle ground between REA Express and the least stringent "business judgment" test, which governs rejection of all executory contracts other than labor contracts.

In the 5 to 4 portion of its opinion, the Supreme Court held that a debtor may unilaterally alter or reject a collective bargaining agreement pending action by the bankruptcy courts. Such alteration or rejection, prior to court approval, does not constitute a violation of the National Labor Relations Act (NLRA). The Court went on to explain, however, that its holding did not relieve the debtor of all obligations under the NLRA. To the contrary, the Court emphasized that a debtor remains an "employer" under the terms of the NLRA and is obligated to bargain in good faith with its employees over the terms of a new contract.

The House bill, H.R. 5174, contains provisions which would overrule every aspect of the Bildisco decision. H.R. 5174, for example, adopts the REA Express standard unanimously rejected by the Supreme Court. It also takes away the right of the debtor to unilaterally alter a labor agreement without requiring an expedited decision by the bankruptcy court on the issue of rejection. H.R. 5174 also sets forth certain bargaining procedures with which a debtor must comply before the court may approve rejection of a collective bargaining agreement. Finally, many have interpreted provisions of H.R. 5174 as rendering all claims resulting from breach of a labor agreement to be entitled to an administrative expense priority -- a change in existing law which would make in practically impossible for some companies to reorganize.

H.R. 5174, containing these clearly unacceptable labor provisions, was passed by the House only one month after Bildisco was decided by the Supreme Court. This 9 to 0 decision was completely overruled without benefit of hearings on or careful study of this complex area of bankruptcy law. Many Members of the House of Representatives, during the floor debate on H.R. 5174, pointed out the impropriety of moving so quickly on legislation to overturn an unanimous Supreme Court decision without such hearings or study. I share that concern, and my initial reaction was to oppose inclusion of any labor provisions in a Senate bankruptcy bill. Organized labor is asking Congress to change a Supreme Court decision which, in my view, is practical, consistent with the policies of the Federal bankruptcy laws, and fair to both companies and employees facing a Chapter 11 reorganization. In the interests of prompt passage of a critically needed bankurptcy bill, I have been urged by many to consider including in the Senate bill language addressing certain aspects of the Bildisco decision. The purpose of our hearing, therefore, is to assess the need for such leigslative action and to determine what resolution of these issues would be fair to all parties involved.

I would like to welcome all of the witnesses who have agreed to testify today. I am sure that their testimony will be of great assistance to Members of both Judiciary and Labor Committees.

PREPARED STATEMENT OF SENATOR RIEGLE

Thank you, Mr. Chairman. Our hearing this morning focuses on an issue that some have characterized as the major labor issue of the 98th Congress. It concerns the use of the Bankruptcy Code by companies to unilaterally reject the collective bargaining agreements they have negotiated and signed, before obtaining the approval of a Bankruptcy Court. Unilateral modification of these agreements removes any voice that working men and women thought they had regarding their wages and other employment terms. Unfortunately, the Supreme Court sanctioned these practices in its recent decision in NLRB v. Bildisco. This decision may encourage the increased repudiation of labor agreements by companies seeking to lower their labor cost, thereby obtaining a competitive advantage over rivals. Moreover, it has the potential for increasing labor strife and could ultimately undermine the collective bargaining process.

As the ranking Democrat on the Senate Labor Subcommittee, I believe that Congressional action is necessary to prevent this labor strife. I am hopeful that this hearing will examine some of the labor relations problems that the Bildisco decision will spawn. The other body has acted on this problem. I hope that the Senate will act soon to reestablish some voice for the working men and women of this country who have watched in desperation as companies have torn up the labor contracts protecting their employment rights and benefits.

An appropriate balance must be struck between the policies underlying Chapter 11 of the Bankruptcy Code (Chapter 11) and the National Labor Relations Act (NLRA). Section 365(a) of Chapter 11 permits the rejection of executory contracts in order to promote the successful reorganization of the company, or "debtor-in-possession." This grant of power permits an ailing company some "breathing room" from its creditors so that it will have sufficient time and capital to adjust its practices in order to stave off liquidation. Section 8(d) of the NLRA prohibits the unilateral mid-term modification of the collective bargaining agreement by either party in order to promote collective bargaining between the parties to resolve their differences. It requires that the party seeking modification to notify the other party 60 days prior to the proposed modification; to offer to negotiate and meet with the other party; to notify mediation services of the dispute; and to refrain from taking any economic action such as a lockout or a strike. Clearly, these requirements exist to encourage dialogue between the two parties in order to achieve a mutually agreeable solution.

While some tension exists between these requirements of section 8(d) and the provisions of section 365(a), the policies underlying them can be accommodated. A fair accommodation should permit a truly ailing company to reject its labor agreement, but only after meaningful negotiations between parties have revealed that a less drastic solution does not exist. The Bildisco decision does not represent a fair accommodation of these policies. It offers little solace to the rank and file who believed that their contract protected their rights.

The Supreme Court reached several conclusions in Bildisco. It held that a collective bargaining agreement constitutes an executory contract subject to rejection under the language of section 365(a) of Chapter 11. It reasoned that since Congress had exempted collective bargaining agreements covered by the Railway Labor Act from section 365(a)'s grant of power but had not provided for a similar exemption for collective bargaining agreements covered by the NLRA, it concluded that this Congressional inaction was dispositive of the issue. While it is true that Congress crafted a special exemption for labor agreements covered by the RLA because of the sensitive nature of rail labor agreements, I would point out that Congress was not faced with the "creative" use of the Bankruptcy Code that exists today when it amended the Bankruptcy Code in 1978.

The Bildisco decision also addresses the standard a debtor-in-possession must satisfy in order to have a bankruptcy court approve its rejection of the labor agreement. It requires a debtor-in-possession to establish only that the labor agreement "burdens the estate" in its attempt to reorganize. In fashioning this standard, the Court specifically rejected the standard in effect when we enacted the 1978 Bankruptcy Code. That standard, enunciated by the Second Circuit in BRAC v. REA Express, required a debtor-in-possession to show that only by rejecting the labor agreement could it prevent liquidation and the resultant loss of jobs. The Court rejected the REA Express standard because it found that although the evidentiary burden presented by the standard might not prove insurmountable, it could present difficulties that would interfere with the reorganization process. While the REA Express standard might present these difficulties, the "burden" standard announced in Bildisco is one that virtually any company can satisfy once it decides to file for Chapter 11 protection. It does not take into account the policies underlying the NLRA and therefore does not represent a fair accommodation of the competing policies.

Bildisco also requires that a bankruptcy court must be persuaded that reasonable efforts have been made to negotiate a voluntary modification of the agreement before it can rule on the petition. It does not require, however, that the parties bargain to impasse or satisfy the requirements of section 8(d). Indeed, the Court states that a bankruptcy court does not have the expertise to make these determinations. This lenient requirement will not encourage serious bargaining on the part of the ailing company.

By a 5 to 4 vote, the majority in Bildisco found that immediately upon the filing of a bankruptcy petition, the collective bargaining agreement is no longer an enforceable contract. Thus, the prohibitions against unilateral modification provided in section 8(d) vanish even before the bankruptcy court rules whether the rejection of the agreement is lawful. Permitting the debtor-in-possession to disregard the requirements of section 8(d) will also discourage serious bargaining during the post-petition period. As the dissent suggests, resolution of the dispute will be left to the relative strength of the contending forces and will spawn the type of industrial strife that section 8(d) was designed to prevent.

Some editorials have stated that attempts to overturn aspects of the Bildisco decision are misguided because it will force companies into liquidation with the concomitant loss of all jobs. This argument misses the mark. Modification of this decision will facilitate more serious bargaining between the parties so that they can reach a mutually agreeable solution less drastic than the rejection of the collective bargaining agreement. This solution will prevent industrial strife and will grant employees a voice in their future -- a voice that the Bildisco decision does not permit. I would point out that successful agreements have been reached recently between ailing companies and their employee representatives once they have undertaken serious negotiations. One notable example is the agreement reached by Eastern Airlines and its unions last fall. Instead of tearing up its labor agreements in face of mounting losses, Eastern permitted the independent analysis of its records justifying its need for wage concessions. The parties then negotiated these concessions in exchange for stock ownership in the company and a greater voice for employees in management decisions.

Some commentators have stated that the business community should not rush to embrace the practices sanctioned by the Bildisco decision. Bildisco provides incentives for the less efficient and more marginal enterprises to make use of Chapter 11. By legitimizing the aggressive use of the Bankruptcy Code by these companies, the Court has placed them in an unfair competitive position compared to the healthier firms in the industry. This practice will impede the smooth operation of the free enterprise system. As an editorial in the September 28, 1983 issue of the Journal of Commerce states:

> "In the capitalist system, an obligation is an obligation, a contract is a contract and bankruptcy is--or should be--what happens when a company literally is about to fail. A contract shouldn't be abrogated because one party ... thinks his employees make too much money. Nor should someone receive the protection of the Federal Bankruptcy Code for similar reasons."

While it remains essential for a truly ailing company to have the opportunity to restructure its debt and to prevent liquidation, we must require more accommodation with the policies underlying our labor laws in order to prevent the abusive use of the Bankruptcy Code.

I believe that the issue before us should not break down into labor versus management lines. I have tried to suggest that both sides can benefit through the modification of the Bildisco decision. Most importantly, this modification will permit the working men and women of this country to have a voice in these important decisions that have a direct effect on their futures. Their representatives are not blind to the reality of financial difficulties faced by companies with substantial debts. They will negotiate concessions when they realize that the alternative is liquidation and the loss of all jobs. Let the collective bargaining process work. We have recent examples of success showing that this process does work even when a company finds itself in dire straits. I hope that this hearing will establish that only through modification of the Bildisco decision will our system of collective bargaining be permitted to function smoothly.

STATEMENT BY THE HONORABLE JEREMIAH DENTON BEFORE A JOINT HEARING OF THE COMMITTEE ON THE JUDICIARY AND THE COMMITTEE ON LABOR AND HUMAN RESOURCES CONCERNING THE BILDISCO DECISION

Jeremiah Denton

10 April 1984

Chairman Thurmond and Chairman Hatch:

I commend you both for holding a hearing on the Supreme Court's decision in the case of NLRB v. Bildisco and Bildisco, in which the Court dealt with the question of the rejection of collective bargaining agreements during bankruptcy reorganizations. The complicated policy issues raised by the Bildisco case deserve careful review and analysis lest we enact a hastily-drafted amendment reversing or modifying the decision. Today's hearing is an appropriate step in the necessary process of review and analysis.

Chairman Thurmond and Chairman Hatch, as you know, in its decision in Bildisco, issued on February 22, 1984, the Supreme Court addressed three specific issues affecting collective bargaining agreements. By a vote of 9-0, the Court ruled that a debtor-in-possession may reject a collective bargaining agreement.

The Court, again by a 9-0 vote, also ruled that a bankruptcy judge should permit the rejection of a collective bargaining agreement if the debtor can show that the agreement burdens the estate and that the equities balance in favor of rejection.

Finally, by a majority vote, the Court held that a debtor does not commit an unfair labor practice when it unilaterally rejects or modifies a collective bargaining agreement after the filing of a reorganization petition but before the contract rejection has been approved formally by the bankruptcy court.

After failing to act on the Senate-passed bankruptcy bill for almost a year, the House now has hastily passed a bill that includes a provision that overturns the Bildisco decision. I note that the bill was introduced only two days before it was taken up on the Floor, was never considered by the House Judiciary Committee in hearings or Committee mark-ups, and was brought to the House Floor under a rule that did not permit the House to vote separately on the Bildisco provision.

The Bildisco provision of the House bill creates a new standard to be used for setting aside a collective bargaining agreement in a reorganization proceeding. The new test would be that labor contracts could not be rejected unless "any financial reorganization of the debtor will fail" and adds an additional test that "jobs covered by such agreement will be lost." The bill would also make labor contracts enforceable after filing and until rejected by a bankruptcy court.

with the one qualification

Chairman Thurmond and Chairman Hatch, I believe the Bildisco decision properly balanced our national policy of protection of the collective bargaining process with the need to avoid the job

LOSSES AND ECONOMIC DISLOCATIONS ENGENDERED BY BUSINESS FAILURE. YET I AM CONCERNED WITH THE ABILITY OF OF A DEBTOR-IN-POSSESSION TO UNILATERALLY REJECT A COLLECTIVE BARGAINING AGREEMENT WITHOUT AN EXPEDITED HEARING.

WHILE, OTHER SENATORIAL DUTIES WILL NOT ALLOW ME TO BE PRESENT DURING THE COURSE OF THE HEARING, I WILL BE ANXIOUS TO REVIEW THE TESTIMONY AND TO LEARN OF ANY JUSTIFICATIONS FOR CONGRESSIONAL ACTION HASTILY TO REVERSE A UNANIMOUS DECISION BY THE SUPREME COURT OR TO MODIFY A MAJORITY DECISION BY THAT COURT.

The **CHAIRMAN**. Our first witness today is the president of the Teamster's Union, Mr. Jackie Presser. Mr. Presser, we welcome you to our joint Labor and Judiciary Committees, and we look forward to taking your remarks at this time. We appreciate your willingness to be here, and we appreciate the work that you and other labor union leaders did in trying to bring this to an effective fruition, as we worked so hard on this in the last couple of weeks to try and come up with a compromise that might bring this matter out in a way that would benefit all persons concerned. We appreciate the efforts that you and your counsel put forth.

Before you begin, Mr. Presser, I notice Senator Specter is here, and he would like to put his statement in the record.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator **SPECTER**. Thank you, Mr. Chairman. I just have a word or two.

I commend you for your very strenuous efforts in trying to bring this complex matter to a conclusion and some sort of a compromise, and I am glad to see these hearings held today as promptly as we could after the negotiations were not fruitful. The sense I have is the importance of coming to a resolution of the problem, if we can, under any possible construction and circumstance.

The bankruptcy courts are very vital to this Nation. I have had many of my constituents come to me with the problems of the ongoing functioning of the bankruptcy courts. The bill has new judges, which are really necessary for the administration of justice across this country. This issue raised by the *Bildisco* case is a very important one—no doubt about that—and I believe that the Congress has a responsibility to really grapple with this issue and to resolve it. To the extent that it can be solved by agreement of the parties, who are very knowledgeable and very much into this issue, it would be enormously helpful.

I am pleased to participate in these hearings and to work with both committees and with the chairman, Senator Hatch, in any way that I can. Thank you, Mr. Chairman.

The **Chairman**. Thank you, Senator Specter. We are really happy to have you here today.

Mr. Presser, we will take your statement at this time.

STATEMENT OF JACKIE PRESSER, GENERAL PRESIDENT, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA; ACCOMPANIED BY PAUL LOCIGNIO, DIRECTOR OF LEGISLATIVE AFFAIRS; ROBERT BAPTISTE, COUNSEL; AND JOHN CLIMACO, COUNSEL

Mr. **Presser**. Good morning. My name is Jackie Presser, and I am the general president of the International Brotherhood of Teamsters. I welcome this opportunity to address the compelling problems created by the abuse of the bankruptcy laws and the gradual deterioration of the enforcement of collective-bargaining obligations. These problems have become even more acute since the Supreme Court's decision in the *Bildisco* case, which, as you know, involved a Teamsters local union.

The International Brotherhood of Teamsters is a labor organization comprised of approximately 700 local unions. The collective membership of the local unions totals approximately 1.8 million working men and women. Some 80,000 to 100,000 different collective-bargaining agreements cover Teamsters-represented employees in this country.

While the Supreme Court's decision in *Bildisco* has focused public attention upon bankruptcy, we in the Teamsters Union for several years have been dealing with the problems connected with bankruptcies caused by the economic deregulation of the transportation industries. Since the passage of the Motor Carrier Act of 1980, which deregulated the trucking industry, approximately 200,000 of our members have lost their jobs. These failures have hit some of the oldest and largest trucking concerns.

Since we represent over 40,000 members in the airline industry, employed by a wide range of carriers, including Pan Am, North-west, Western, World, and Braniff—to mention just a few—we have made strenuous efforts to assist those carriers who deal in good faith with us in order to assure their survival. In response to the serious financial problems caused by deregulation, many carriers have attempted to lower costs by pursuing exploitive labor policies. This phenomenon is becoming increasingly common. Heavy-handed threats to file for bankruptcy in order to coerce sacrifices from employees have become a stock weapon in management's arsenal against labor.

What we are witnessing is a very dangerous trend. It is a threat to the entire system of collective bargaining that is so basic to our Nation's labor policies and also, we believe, to the basic structure of the American economy. If corporate giants succeed in evading their bargaining obligations and destroying collective-bargaining agreements, then their cynical strategy will become an accepted way of doing business in this country.

The most devastating aspect of the Supreme Court's decision in *Bildisco* is the fact that the decision effectively destroys the incentive for the parties to reach a mutually satisfactory solution at the bargaining table. Since those dark days during the Great Depression in the 1930's, the foundation of our Federal labor policy has been to encourage the collective-bargaining process. Experience has proven the validity of that policy. Negotiations with labor, conducted in good faith, are often very productive for an ailing business seeking to avoid collapse. Even if bankruptcy is inevitable, labor participation during the bankruptcy can help effectuate a sound reorganizational plan.

As all of you may know, I am not a lawyer. Therefore, my approach to dealing with the Supreme Court's decision in *Bildisco* is based upon practical real-world experience, rather than theory. As the head of the largest trade union in the free world, I must tell you that the Supreme Court's decision in *Bildisco*, if allowed to stand, will have disastrous consequences for the working men and women of this country and the health of the American economy.

Based upon my 38 years of experience in the trade union movement, the following are my suggestions for amending the current law.

First. Encourage good-faith collective bargaining. Good-faith collective bargaining should be a necessary precondition to the debtor's filing of a motion for contract rejection. Labor and management working together in good faith to deal with both the immediate and the long-range problems of a bankrupt employer is an absolute necessity for survival.

Second. The debtor should provide, in a timely manner, relevant information to the union. In order for the union to evaluate properly the debtor's financial situation, relevant information should be provided concerning the compensation and benefit levels for other employees of the debtor, to ensure that the union workers are not being asked to bear a disproportionate share of the sacrifices. Financial transactions and arrangements between the debtor and affiliated companies should also be explored, in order to assure that the debtor's financial condition is legitimate.

Third. Unilateral changes in wages, hours, and working conditions should be prohibited prior to the rejection of the contract by the court. The debtor does not have an incentive to negotiate in good faith if he or she retains the legal right to make unilateral change prior to the court ruling on the motion to reject the contract.

Fourth. The debtor should be required to obtain the participation of the other parties to the bankruptcy prior to having the collective-bargaining agreement rejected. If the debtor demonstrates that the other parties to the bankruptcy are sharing in the sacrifices during the reorganization process, our experience has been that the unionized workers will shoulder their fair share, even without the necessity for having the contract rejected. For example, the debtor should demonstrate that the executives, managers, supervisors, and the unrepresented employees have made a contribution to cutting waste and reducing labor costs. The debtor should also demonstrate that the trade creditors and lending institutions have done their fair share. In other words, the focus for the cost-cutting effort should not be directed exclusively at the workers covered by collective-bargaining agreements.

Fifth. If all of these procedures have been followed, the debtor should have a prompt hearing on the motion to reject the collective-bargaining agreement.

We recognize that if the debtor has exhausted the collective-bargaining process, he should have a prompt hearing on the motion to reject the collective-bargaining agreement. Along these same lines, when the judge issues the decision, a procedure should be devised whereby a prompt resolution of the appeal can occur. Both sides to the collective-bargaining process need to have the issue of the status of the collective-bargaining agreement resolved within a reasonable period of time. For example, if the collective-bargaining agreement is rejected, the debtor is still obligated to negotiate for a successor collective-bargaining agreement with the union. While an appeal is pending from a decision to reject the prior collective-bargaining agreement, the union is in a dilemma as to whether to negotiate a new agreement or await the outcome of the appeal.

Sixth. During the collective-bargaining process prior to the hearing and at the hearing, the debtor should be required to establish the relationship between the rejection of the collective-bargaining agreement and the ultimate rehabilitation of the company.

Not only does this requirement establish the necessity for the changes in the collective-bargaining agreement proposed by the debtor, but it also requires the debtor to demonstrate that if the collective-bargaining agreement is rejected by the court, the sacrifices will result in the company's rehabilitation and its very survival.

Seventh. The amendments should be made effective immediately. Because of the undermining of the collective-bargaining process inherent in the Supreme Court's *Bildisco* decision, the corrective amendments should be made effective immediately upon enactment. Otherwise, unscrupulous employers will seek to take advantage of their immunity from the collective-bargaining process, to the ultimate detriment of the workers. In any event, having the amendments take effect upon date of enactment is, as I understand the law, the normal rule. It would give preferential treatment to certain employers if any other effective date were used.

The above constitutes an outline of what I feel to be necessary amendments which should prevent unscrupulous employers from abusing the bankruptcy process. I realize that time is again running short for reaching a legislative solution to the differences in approach between the employers and the unions in this very complicated and critical area. Therefore, if the International Brotherhood of Teamsters can in any way advance this process, I want you to know that we stand ready, willing, and able to assist in order that the working men and women of this country are dealt with fairly and equitably under the law.

I also, Mr. Chairman, on behalf of our international union, would like to take the liberty on behalf of all the working people of this country to thank you for your personal contribution, your tolerance, and your indulgence in permitting us to provide the necessary language and legislation we think should be adopted. I thank you for giving me this opportunity to appear before you today.

The CHAIRMAN. Thank you, Mr. Presser. We appreciate having your testimony this morning.

The House bill, unlike most legislation enacted by Congress, would only apply to cases that arise after the date of enactment. I think you know that they would not apply to the pending cases on the date of enactment. Now, in my discussions with you, you have advocated strongly making the effective date the date of enactment. Could you explain to us why you want that done?

Mr. PRESSER. In many cases, we have companies right now, Mr. Chairman, that are simply filing for bankruptcies and no longer recognizing any part of the contracts that we presently have with these companies. They are taking total advantage of all the things that we have fought so strenuously for through organized labor: health and welfare, pension cases, it will involve ERISA, it will involve the withdrawal liability provisions that this body is so dilligently working to find an answer to. There are many things that are being perpetrated throughout all the unions in this country today, since the *Bildisco* decision. I think that the law should take effect upon the signing of the bill and not what took place when it was submitted in the House in the past.

We also feel that it is the only fair rule that should apply for everybody.

The CHAIRMAN. As you know, business will most likely be in dire straits before they would consider an action that would deprive them of their trained and reliable work force. Now, if they are in such dire straits, they cannot enter into protracted negotiations about the future of their labor contracts. Would you be willing to accept some legal requirement that required the bankruptcy court to decide, within a specified time, whether the contract is to remain in force? Would 30 days be too long? Should it be less? Should it be more?

Mr. PRESSER. I think that the decision of the legislation we are recommending is going to hold the future of the working people of this country in the hands of the decision that is going to come down. I would be in favor of a period of time which will enable us to have an opportunity to meet with the management, with the company people, find out their true position. You know, Senator, it is not like management and labor just got here yesterday. We have watched the trucking industry particularly. We are more equipped to talk about bankruptcy since deregulation was instituted in this country. I think our international union has experienced a great deal more bankruptcies than anybody else, and we are more qualified to sit down and meet with the necessary people to try to find some common ground.

Yes, there should be a period of time. Sixty days would be ample time, I believe, to be able to discuss and work out the protection for the company, as well as the people that we represent. We are well aware of the fact that without companies there would be no employees.

The CHAIRMAN. Could it be less than 60 days?

Mr. PRESSER. I think a matter as serious as this, with all the various infrastructures of some of these large companies, I don't think you can accomplish in 60 days a conglomerate the size of a Roadway or Consolidated Freight. Those are giants in our industry, and there are a lot of facets and options that would have to be looked at.

Mr. BAPTISTE. Senator, are we talking about a 60-day period to start from the commencement of the motion to reject being filed or the entire process?

The CHAIRMAN. I presume from the date of the motion.

Mr. PRESSER. From the time of the motion, we could do it within 60 days or less.

The CHAIRMAN. As you know, the Supreme Court stated that a business may unilaterally reject its labor contract without court approval. That is what part of the *Bildisco* decision says. Since this rejection is just temporary, until the bankruptcy court can rule on the issue, usually within a short time, why do you consider, Mr. Presser, this unilateral rejection to be destructive to your union?

Mr. PRESSER. In the past week, we have had almost 5,000 people who are out on the street. A company has acquired an opportunity to take over two other companies that are in dire straits. What he has done is, he goes in and tells them they are no longer employees to drive trucks for the company; that if they want to buy the equipment that he has and become owner operators, they can go to work tomorrow morning. If they don't want to do that, they are out of a job.

At the present time, we have very close to 5,000 people who are now out on the street. Companies are shut down and there are picket lines up. There is no health and welfare, no pensions, no seniority, no guarantees of holidays or whatever we have negotiated into our national master freight agreement, let alone into our supplements. They have totally disregarded the working contract that we have had with companies going on to 20 or 30 years. They have totally set it aside.

The CHAIRMAN. Mr. Presser, the unions have expressed the fear that the *Bildisco* decision will provide employers new incentives to run to the bankruptcy court in order to shed the burdensome aspects of the collective-bargaining agreement. Now, does the experience of the Teamsters over the last month in any way bear that out?

Mr. PRESSER. Exactly. The example I just gave you, I do not want to mention the companies, it taking place in my State, it is taking place in Michigan, Indiana, Kentucky right now. In the past several weeks, many of our companies have simply thrown the contract aside and gotten rid of 30- or 20- or 25-year employees. They do not recognize seniority. They are offering them IRA's, even though they are bound by a national contract that provides pensions and welfare. They are disregarding contributions, and they are threatening our people in many instances, "If you don't agree to these terms, we will file for bankruptcy."

The CHAIRMAN. How have you responded to this?

Mr. PRESSER. We are holding to our contract. If the employers take the position that we do not have a contract, then the employees are out in the street and we are striking.

The CHAIRMAN. Do you think that the resort to self-help or strikes by your union has helped the employer to obtain a better financial condition

Mr. PRESSER. It is not really helping them to find a better financial position. What he is doing is, he is squeezing the life blood out of these people who do not have reserves to survive on, and they are bringing them back in for $5 and $6 an hour less than what they were working for under contract. But that is not working in all cases, Senator. We are already beginning to see the signal for many of the people in the trucking industry that we represent saying, "Shut them down nationally." We do not want to get into that; we think there is enough economic strife going on right now.

The CHAIRMAN. If I understand you correctly, you think that the bankruptcy code and the National Labor Relations Act should be integrated in such a way as to direct the parties away from strikes and other work disruptions but toward collective bargaining? Is that a fair statement of what you just said here today?

Mr. PRESSER. Correct.

The CHAIRMAN. Mr. Presser, representatives from the business community point out that whatever detriment arises out of a unilateral rejection of the collective-bargaining agreement, that detriment is overcome by the fact that an employer in reorganization must still, No. 1, recognize the union as the collective-bargaining representative of the employees, and No. 2, negotiate with the union toward a new contract. Now, why are not these recognitional and bargaining rights adequate to secure the collective-bargaining process for the benefit of the employees?

Mr. PRESSER. They have already answered that recognition section you are speaking about by simply disregarding the entire labor agreement and filing for a bankruptcy. They totally disregard the present agreement that they have had all these years. They do not say to the labor organizations, "We want to sit down. We want to open our contracts. We want to find a common ground. We want to give notice." They do none of that. What they simply do is, they terminate the agreement, they violate everything that has existed under the agreement, and they simply go back out and try to hire the same employees with no health and welfare, no pension, no holidays, no vacations, no guarantees.

You are destroying the collective-bargaining system that has been the backbone of this country for working people since organized labor first started. I would say to you, Senator, that any country where there is not organized labor you will find that those are dictatorial countries. I say that if ever in my career of 38 years I see bad clouds on the horizon for the working people of this country, the Bildisco situation must be resolved so that organized labor has a chance to speak for its people.

The **Chairman**. We have a number of other Senators here who have other questions, and I will submit some to you in writing, but just let me ask you one last question that I will ask to every witness who appears before us today. Would you and your organization be willing to sit down with myself and other interested Senators in a proposal which will best balance the interest of preserving the collective bargaining process in the interest of maximizing the ability of the bankruptcy court to realize successful rehabilitation of financially troubled companies?

Mr. **Presser**. Absolutely. And you know, Senator, we are overlooking the process of Federal mediation, conciliation, the National Labor Relations Board, we forgot about the Landrum Griffin, we forgot about Taft Hartley. This country has provided a lot of measures for the working people of this Nation. *Bildisco* wipes out everything. On your invitation to us, as I stated in my opening statement, we would be more than willing to meet with anybody at any time.

The **Chairman**. Let me say this. There are two sides to this question, as I see it, and we have to be concerned about the financially troubled company and its right to survive. On the other hand, collective-bargaining agreements have been time-honored contracts, and we have to be concerned about abuse of the process as well, abuses that you have been speaking about, if they are in fact abuses. We are all concerned about it. We want to resolve this, and frankly I do not think the House has resolved that. I think it just went all one way, and frankly I do not think that is going to be the law when it finally comes down. I do not see how it can be, because in some ways if that becomes law, we are just writing these companies off without giving them a chance to survive.

Mr. **Presser**. Exactly right.

The **Chairman**. Let me turn to the distinguished chairman of the Judiciary Committee, Senator Thurmond, who is co-chairing these hearings.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Senator **Thurmond**. Mr. Chairman, I ask unanimous consent that my opening statement follow your statement in the record.

The **Chairman**. Without objection, we will put your statement and all statements of the distinguished Senators in the record at the appropriate point.

Senator **Thurmond**. I have a few questions that I would like to propound. In reorganizations in which the Teamsters have been the authorized representatives of the employees, how many reorganizations were filed by companies not in serious financial difficulty but who simply wished to get rid of their collective-bargaining agreements?

Mr. **Presser**. None of the companies wished to get rid of their collective-bargaining agreements, senator. What they have asked for is an ESOP or a 15 percent voluntary reduction by their employees. They have met with our local unions and officers of our international in advance of going into a bankruptcy. That has become a very common pratice in the past several years in the United States. We have numerous companies that we could name and identify who have had that opportunity to come in and get reduced rates, get reduced contributions, and language changes that enable them to go on and build their businesses back up. In the majority, those companies have survived.

Senator **Thurmond**. I recently received a copy of a decision by the U.S. Bankruptcy Court for the District of Minnesota, dated March 30, 1984, ruling on a motion by Briggs Transportation Co. to reject its Teamsters contracts. The count specifically found the following: "With the exception of the 15-percent individual give-back program, in which the unions played only a passive role, discussions between Briggs and various union representatives regarding modifications of the collective-bargaining agreement have been unproductive. The unions today have not granted any meaningful concessions, either in compensation or the terms and conditions of employment conditions."

The court went on to allow rejection of the collective-bargaining agreements, commenting that, "In the event of a liquidation, all Briggs employees will be terminated with no opportunity to be recalled." Now, what purpose was served by union inflexibility in this instance?

Mr. **Presser**. Mr. Chairman and Senator Thurmond, that example that you just gave has been negotiated out these past 72 hours with the owner of that conglomerate. That is a case where a giant squeezes the small to acquire the routes and the businesses of a company that could just have enough financial structure to continue in business. In that particular company, there were 30- and 35-year-old employees, who have had that many years of service with that company, who were removed because that new employer told them that if they did not want to buy the equipment, they did not have a job. That company happens to be in the State of Ohio, as well as other multi-States, and I am at liberty to tell you, sir, that the organization, the company that bought them, has taken full advantage of the *Bildisco* situation. Totally.

Senator **Thurmond**. How should Congress encourage good-faith bargaining by all parties to a collective-bargaining agreement including the union?

Mr. **Presser**. Simply by giving them an opportunity to be able to jointly sit down and work out the problems, the period we discussed with the chairman, allowing us to have the opportunity to meet with the company, try to devise and find ways to protect the people who really built that company, the employees, rather than simply have a Briggs operation file for a bankruptcy, call in 280 some people to tell them, "You are out of work tomorrow. The new company says, if you don't buy the equipment, you don't have a job."

Senator **Thurmond**. If court approval prior to rejection of a labor contract were required, what would you believe to be an appropriate time limit for an expedited decision by the court?

Mr. **Presser**. Thirty to sixty days.

Senator **Thurmond**. Mr. Presser, do you interpret a provision which would become effective on the date of enactment as one which would retroactively apply to pending cases?

Mr. **Presser**. No. I say the day the President of the United States signs it, it is a bill just like other rules, and then it becomes effective.

Senator **Thurmond**. Do you believe that any procedural changes enacted by Congress should be applied retroactively, even though application might require expensive relitigation of issues not yet finally decided?

Mr. **Presser**. The Supreme Court has already determined that all of the pending rules would apply.

Mr. **Baptiste**. Senator, I would direct your attention to the 1974 decision of the U.S. Supreme Court, *Bradley* v. *School Board of the City of Richmond,* where they gave an extensive discussion of that very rule. They cite the fact that the normal rule is that any change in the law is applied to any pending cases; that is the normal rule. I submit that the rule adopted in the House bill, H.R. 5174, that is before you is the exception rather than the normal rule. If there is any manifest injustice that results from the application of the new law applying to pending cases, that is a matter that the Supreme Court says the court should resolve, keeping in mind, in addition, that bankruptcy courts are courts of equity, and they will adjust the matter as they see fit to avoid manifest injustice, in the language of the Supreme Court.

Senator **Thurmond**. Let me ask you once again. Do you believe that any procedural changes enacted by Congress should be applied retroactively, even though application might require expensive relitigation of issues not yet finally decided?

Mr. **Presser**. I still feel that is a matter that should be left to the courts, Senator.

Senator **Thurmond**. I do not know what you have answered on that, but at any rate, we will let it go at that.

The **Chairman**. Thank you, Mr. Chairman. Senator Heflin, Senator Specter only has one question. Would it be OK if I go to him and let him ask that question? He has been here from the beginning.

Senator **Specter**. Thank you, Mr. Chairman. I have to leave in a moment, but I shall return.

I want to ask you this, Mr. Presser. The central question which has emerged on the controversy is, What standard will the courts apply? The REA standard had been that the debtor was required to show that repudiation was necessary to permit the reorganization to succeed. The Supreme Court has made a somewhat lesser standard, saying it is whether the collective-bargaining agreement is burdensome to the estate and the balance of the equities favors repudiation. That is stronger than the general standard for a court in bankruptcy, which provides that the test should be more stringent than the "business judgment" rule normally applied to commercial arguments.

When we consider these various standards, it seems to me that it is somewhat like the burden of proof we talk about in cases, and this is a form of a burden of proof, where we talk about preponderance of the evidence or proof beyond a reasonable doubt or clear and convincing evidence, which we lawyers have a hard time articulating, and there are real questions in the minds of those factfinders who have to apply them.

What I have been searching for is some intermediate ground which might bring the parties together and wonder if a standard might not be that the bankruptcy court would look to mold the agreement, as opposed to simply having a rejection or leaving it in effect. When Senator Thurmond talks about the *Briggs* decision, where there was the rejection of the contract, that eliminates everything. There are many portions of the collective bargaining agreement: there are wages, grievance procedures, seniority, even union recognition. Might not it be a more sensible approach to direct the bankruptcy courts not reject or affirm but seek to mold, that is, to isolate the specific problems which may be giving the debtor difficulty or making it impossible for him to continue and not to abrogate or completely nullify the agreement, but only to pick out the parts which are necessary on a temporary basis, and then leave the option of the party whose contractual right has been changed to come back in at a later date, where there is a showing of change of circumstance that might enable the debtor to reassume some of the earlier obligations.

If the bankruptcy court had greater authority to mold and change, depending on a timeframe, as opposed to simply affirming or repudiating, might not that bring the parties together and allow temporary relief but give the court the power to leave in effect the provisions which ought to stay in effect and perhaps reinstate some at a later date?

Mr. PRESSER. What you are really saying is that you are leaving the judge in the position of negotiating a labor agreement for working people. You are also saying that you recognize that under the *Bildisco* decision, any employer anywhere in America could simply walk in and file for a bankruptcy. By him simply doing that, there is no longer anybody who has any rights prior to his filing of bankruptcy. That presently is what is happening in the unions across America today, and I am sure it is also going to happen with the creditors of America in the future.

Mr. SPECTER. Mr. Presser, that has been the situation prior to *Bildisco*. Prior to *Bildisco*, debtors could get relief, but it was under a tougher standard. But they had to show that it was a failing business—a stronger standard. *Bildisco* changed the standard. I think there has been a fair amount of agreement—maybe not on all sides—that there ought to be collective bargaining, that there ought to be negotiations between the parties before they go to the bankruptcy judge.

The crunch has come on what standard the bankruptcy judge is going to apply: whether he is going to let the debtor out on how much of a showing that he cannot survive at all, or that it is for his convenience. If you have greater flexibility for the bankruptcy judge, perhaps the standard would not be such a sticking point.

Mr. **Presser**. I think there would have to be a criterion to be met if an employer is going to go into a bankruptcy, and we have a certain number of days for the labor organizations and the creditors and the company. I think the obligation would be for the employer to meet with the parties concerned, and we would then evaluate whether or not relief can be given from the union side, the creditors' side, or the debtor's side. But just to file an instrument that simply wipes out everything the working people have fought for, in my opinion, is 100 percent wrong.

Senator **Specter**. I understand that, but if the parties cannot agree on collective bargaining, and it has to go to the judge, then the tough point comes in, What standard will the judge apply? That is what I understand is the hangup among all the parties today.

Mr. **Presser**. That is correct.

Senator **Specter**. My suggestion is that the bankruptcy judge be given more power to modify and mold, as opposed to simply leaving in effect or rejecting.

Mr. **Presser**. I do not agree that the judge should make the final determination of the bankruptcy position. We would like to have the information given to us. In some cases, families have their cars, automobiles, trips, and airplanes, and country clubs and every other thing imaginable. They are left off with a bankruptcy, and after they are reaffirmed, and they go back into an operational pattern, why we find that there are many things that could have been cut from the operational costs of the company prior to putting us through bankruptcy and denying our people a fair day's pay for a day's work.

Senator **Specter**. Thank you very much, Mr. Presser. I understand your point. Somebody has to make the final decision, if the parties cannot get together. My request to you would be, if you and your counsel would give some further thought to this broader bankruptcy court power to mold, in varying stages, given different timeframes. Thank you very much, sir.

The **Chairman**. Senator Heflin, you have given up your time.

Senator **Heflin**. That is all right. I have no questions.

The **Chairman**. Senator DeConcini.

Senator **DeConcini**. I have no questions.

The **Chairman**. Senator Nickles.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator **Nickles**. Mr. Chairman, I ask that my statement be printed in the record.

The **Chairman**. Without objection, we will insert all statements of Senators in the record.

Senator **Nickles**. Mr. Chairman, I appreciate your comments and cooperative attitude you have had, not only on this issue but, I am hoping, on multiemployer. We are still working on the multiemployer bill. I hope you are still as interested as we are in coming up with a solution to those difficult issues; is that correct?

The **Chairman**. We need lots of help from you on that one.

Senator **Nickles**. You mention in your statement, Mr. Presser, that there have been heavy-handed threats or threats to coerce sacrifices from employees. Can you name companies who have actually done that?

Mr. **Presser**. Yes. Tucker, IML, Mason Dixon, Midwest Emory—do you have all day? I can give you 50 of them today.

Senator **Nickles**. Are those companies who did this prior to *Bildisco?*

Mr. **Presser**. Since *Bildisco.*

Senator **Nickles**. You never had that problem?

Mr. **Presser**. Never. Never had a wipe-out of contracts in all the time we've had our international performing. The Mason Dixon one that Senator Hatch is familiar with, they cited the *Bildisco* issue in the entire closing of the company.

Senator **Nickles**. Are you aware of any companies who have filed a chapter 11 petition that have not attempted to bargain with labor or have not opened their books to demonstrate their distress?

Mr. **Presser**. Just the ones that we are talking about under *Bildisco.*

Senator **Nickles**. They have not attempted to bargain?

Mr. **Presser**. I was at the bargaining table the other night with an employer. It is a multiemployer that represents 10,000 employees for sure, if not more. While I was negotiating with them, trying to do what he had to have done and what we needed to get done, we were receiving telephone calls in the other room that he was already firing the people that we were negotiating for to try to preserve the company, and forcing them to become owner-operators, selling them $20,000 equipment that is not worth $11,000. If they want to work after 15 or 20 years, they buy it and sign the papers or they do not have a job.

Senator **Nickles**. Was that a company who is threatening chapter 11?

Mr. **Presser**. It is in. They are putting people in chapter 11, so they can come in behind them and buy up their companies.

Senator **Nickles**. Is that a company that if it did not modify its contract would maintain operation, or is it a company that would go bankrupt?

Mr. **Presser**. We were meeting for the purpose of modifying the contract, and at that very time he was putting us through the *Bildisco* process, without telling us.

Senator **Nickles**. Which company are we talking about?

Mr. **Presser**. Mason Dixon. There are 4,800 and some people, not counting the nonunion people who work for that company—office people, telephone operators, sales people.

Senator **Nickles**. Are you aware of any company in chapter 11 who attempted to cut employee wages but not the wages and fringes of management?

Mr. **Presser**. Sure. Yes, we are familiar with that.

Senator **Nickles**. Like who?

Mr. **Presser**. Blue Ribbon Transport.

Senator **Nickles**. They wanted to abrogate the contract with their employees but made no reductions in management costs?

Mr. **Baptiste**. That is correct, Senator, and the bankruptcy judge—doing equity, if you will—ruled that he would reject the collective bargaining agreement only conditioned upon management cutting salaries, getting rid of the company cars, and the company credit cards, not to mention having an inordinate number of relatives on the payroll and a number of other aspects. The case is *Blue Ribbon Transportation Co.*, in the Bankruptcy Court of the District of Rhode Island. That is 113 LRRM 3505.

Senator NICKLES. Mr. Presser, you are aware of what I will refer to as the Hatch amendment, where we were close to tacking on or having as a substitute to the House amendment?

Mr. PRESSER. Yes, I am.

Senator NICKLES. To follow up on Senator Thurmond's questions, that amendment would be effective on the date of enactment, which would open up or require companies who had pending chapter 11's to comply with procedures under the amendment; is that correct?

Mr. PRESSER. Yes, that is correct.

Senator NICKLES. And the difference between that and the House's is that the House's would be prospective, only for those who have not filed chapter 11.

Mr. PRESSER. Right.

Senator NICKLES. Do you have any idea how many pending chapter 11's there are to date?

Mr. PRESSER. No, I do not.

Senator NICKLES. But that would touch the Continentals and any of the other chapter 11's who are pending right now?

Mr. PRESSER. Senator Nickles, let me just set the record straight. I am speaking for all organized labor. I wish the room were full of labor representatives today. If Bildisco goes the way it is going, you are going to see a changing of America, the likes of which you will never believe. I am straining to keep our people from putting up picket lines on employers that are threatening them. Industry in America could be shut down over *Bildisco*. You can only go so far. Our people have mortgages. They have kids in colleges. They never dreamt that they could come to work on a Monday morning under a labor agreement, and Monday afternoon be told that they do not have anything. That is a serious situation.

That is exactly what is taking place in America's work force today. This legislation is critical. It has not been felt yet.

Senator NICKLES. I do not know exactly how many chapter 11's are pending right now. Do you think a large percentage of those pending chapter 11's are the ones who have already filed chapter 11, or filed for bankruptcy primarily to abrogate their union contracts?

Mr. PRESSER. I have no idea. I am a realist. I know what it says in the *Bildisco* decision. I understand what it means when employers call our people in and tell them, "You no longer have the union." I know what it means when the pension fund stops getting the money, and I know what it means when our members call up and say, "My child is in the hospital and my wife is in the hospital, and I no longer have contributions being made on my health and welfare. What do I do?" That I understand.

Senator NICKLES. Thank you, Mr. Presser.

[The prepared statement of Senator Nickles follows:]

OPENING STATEMENT OF SENATOR DON NICKLES FOR APRIL 10, 1984

Good morning. I would like to congratulate the respective Chairmen of the Labor and Judiciary Committees for calling this hearing. Two weeks ago representatives of organized labor and the business community were in sharp disagreement as to what Congress should do about the recent Supreme Court decision Bildisco vs. NLRB. Both sides agreed on only one thought -- that this was indeed a major legislative issue. As such, it is only fitting that the Senate, unlike the House, hold hearings so that all sides can express their legitimate concerns and the Congress can act after being fully informed on the issues.

I personally distrust legislative efforts that stampede the Congress into acting outside the normal process, particularly on issues that present as many complications as the issue being considered today, i.e., -- the proper interaction between titles 11 (Bankruptcy) and 29 (Labor) of the U.S. Code.

Mr. Chairmen, I would like to have inserted in the record a series of editorials from the Wall Street Journal, the New York Times, and the Washington Post which certainly call into question the hasty consideration of amendments that overturn the Bildisco decision. Also, Congressman John Erlenborn, ranking member of the House Education and Labor Committee, has forwarded his thoughts on the issue. I ask that it also be inserted in the record.

The Bildisco decision certainly presents the Congress with an opportunity to review the public policies that govern a distressed company's ability to file a chapter 11 bankruptcy petition and to subsequently reform its executory contracts, including its labor agreements. If the Bildisco decision is found to be flawed, Congress needs to find a formula that properly balances the concerns of all parties. These hearings are, therefore, critical to the process and I look forward to the testimony presented this morning.

Wall Street Journal 2/24/84

REVIEW & OUTLOOK

The Burdens of Bankruptcy

Organized labor briefly suspended its Mondale-for-president efforts yesterday to take violent exception to a Supreme Court decision broadening the rights of companies seeking reorganization under the bankruptcy laws to abridge labor contracts. Under the court's standard, the employer only has to show that the labor contract "burdens" the reorganization process, not that it makes it impossible.

"It's outrageous!" declared Machinist president William Winpisinger. "Devastating!" said Gerald F. McEntee of the State, County and Municipal Workers. Labor's chieftains were quickly on the phone to their patron saint, Tip O'Neill, who duly promised that he would do something about this horror.

It seems, however, that this is only another case where the institutional interests of organized labor are in conflict with other institutional interests just as deserving of consideration. And it also may be a case of the not-uncommon type where the interests of labor union professionals are in conflict with those of workers themselves.

In his opinion for the majority (the court split 5-4 on the crucial part of the ruling), Justice Rehnquist commented that the "policy" of Chapter 11 of the bankruptcy act is to "permit successful rehabilitation of debtors." In other words, no one's interest is much served if a company goes down the tubes. And since successful reorganization is often dependent on a new infusion of credit, it doesn't help the process much when the interests of creditors are subordinated to those of a unionized work force.

Even under the standard enunciated by the court, creditors and other claimants find their interests somewhat subordinated to labor. The court upheld the principle that rejection of a labor contract should be held to a stricter standard than the rejection of an ordinary contract. Still, it said that trying to achieve some equity among all the various claimants in a bankruptcy proceeding is one of the primary purposes of bankruptcy laws.

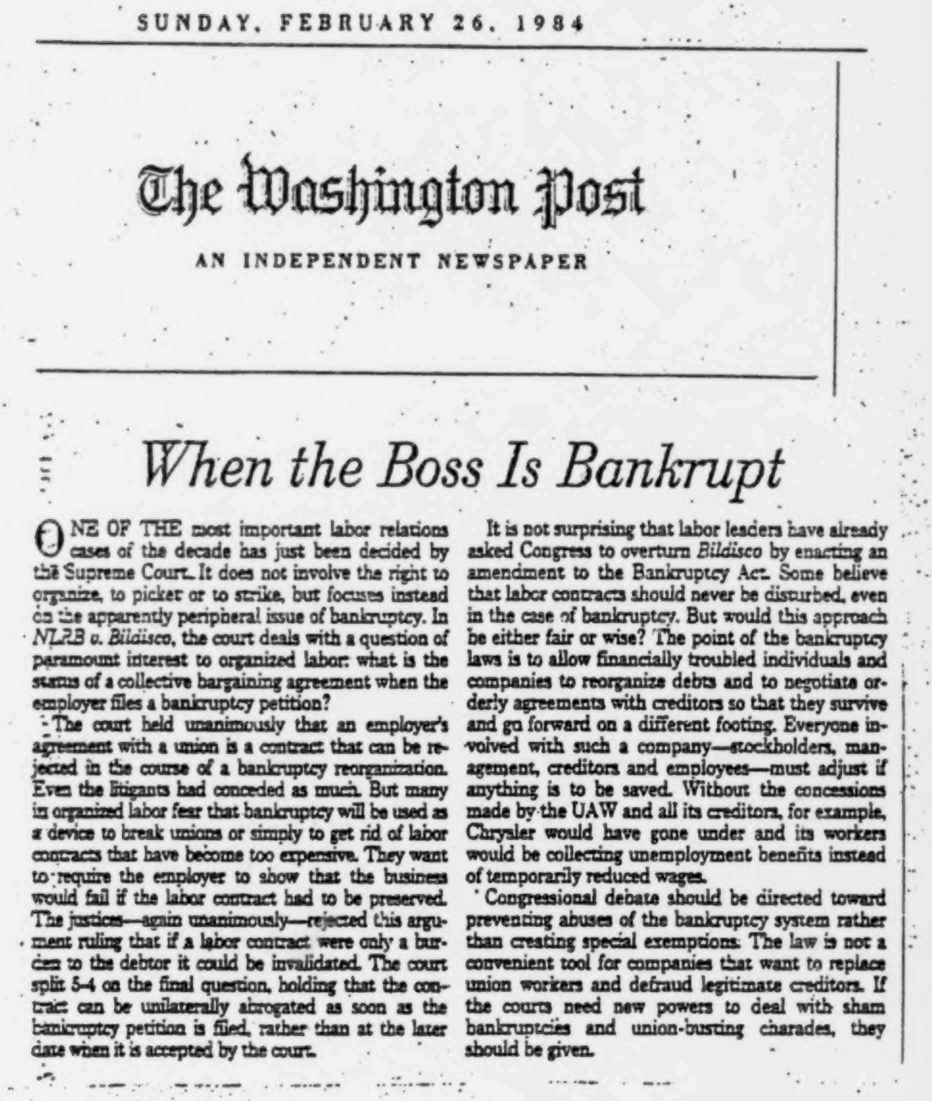
The unions, for their part, contend that the ruling opens the door to union busting. In this case, involving rejection of a Teamsters contract by a New Jersey building-materials distributor called Bildisco & Bildisco, the court overruled a National Labor Relations Board finding that the rejection had constituted an unfair labor practice. Unions claim that, with this ruling on the books, any company could bust a union contract merely by filing a Chapter 11 proceeding. The unions want Congress to pass a law that would protect labor contracts in such cases.

But first of all it seems unlikely that healthy companies are going to start filing Chapter 11s willy nilly, with all the legal costs and risks that entails, just to break a labor contract. For one thing, a bankruptcy court probably would not treat a bogus filing lightly.

And then there is the question of how a new law would affect workers. If such a law had been in effect, the Teamsters local at Bildisco would have continued to receive dues and remittances to the Teamsters pension fund even after the company sought protection from its debtors. The union's cash flow would have been unaffected at a time when the company was having trouble maintaining its own cash flow. Even if the company were not able to show that this was forcing liquidation, its prospects would have been much diminished.

That means that its employees' prospects, pretty much inseparable from those of the company, would not have been so bright either. A recent Heritage Foundation study by economist Morgan O. Reynolds of Texas A&M illuminates a truth frequently overlooked: So-called job security laws often have just the opposite effect. A company bound up with legal obligations that gets into trouble is much more likely to sink than one with some possibilities for lightening its load. And such obligations often discourage new business formation, as England would discover if anyone ever bothered to give the matter some study.

Labor's reaction to the Bildisco ruling is reflective of the embattled position union leaders find themselves in today. It could be that they will become even more embattled until they learn that their institutional interests and the interests of working people have not been very harmonious of late. The problem won't be solved by fulminating at the Supreme Court's efforts to maintain equity in the process of saving troubled companies.



SUNDAY, FEBRUARY 26, 1984

The Washington Post

AN INDEPENDENT NEWSPAPER

When the Boss Is Bankrupt

ONE OF THE most important labor relations cases of the decade has just been decided by the Supreme Court. It does not involve the right to organize, to picket or to strike, but focuses instead on the apparently peripheral issue of bankruptcy. In *NLRB v. Bildisco*, the court deals with a question of paramount interest to organized labor: what is the status of a collective bargaining agreement when the employer files a bankruptcy petition?

The court held unanimously that an employer's agreement with a union is a contract that can be rejected in the course of a bankruptcy reorganization. Even the litigants had conceded as much. But many in organized labor fear that bankruptcy will be used as a device to break unions or simply to get rid of labor contracts that have become too expensive. They want to require the employer to show that the business would fail if the labor contract had to be preserved. The justices—again unanimously—rejected this argument ruling that if a labor contract were only a burden to the debtor it could be invalidated. The court split 5-4 on the final question, holding that the contract can be unilaterally abrogated as soon as the bankruptcy petition is filed, rather than at the later date when it is accepted by the court.

It is not surprising that labor leaders have already asked Congress to overturn *Bildisco* by enacting an amendment to the Bankruptcy Act. Some believe that labor contracts should never be disturbed, even in the case of bankruptcy. But would this approach be either fair or wise? The point of the bankruptcy laws is to allow financially troubled individuals and companies to reorganize debts and to negotiate orderly agreements with creditors so that they survive and go forward on a different footing. Everyone involved with such a company—stockholders, management, creditors and employees—must adjust if anything is to be saved. Without the concessions made by the UAW and all its creditors, for example, Chrysler would have gone under and its workers would be collecting unemployment benefits instead of temporarily reduced wages.

Congressional debate should be directed toward preventing abuses of the bankruptcy system rather than creating special exemptions. The law is not a convenient tool for companies that want to replace union workers and defraud legitimate creditors. If the courts need new powers to deal with sham bankruptcies and union-busting charades, they should be given.

THE NEW YORK TIMES, MONDAY, FEBRUARY 27, 1984

The New York Times

Founded in 1851

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Labor's Stake in Bankruptcy

Should the bankruptcy laws be a path of escape for companies stuck with high-cost labor contracts? The Supreme Court has now ruled that union contracts can indeed be abrogated as part of an effort to save a company in a "Chapter 11" reorganization. But organized labor argues that bankruptcy is becoming a ploy for union busting. It wants Congress to exempt union contracts from renegotiation.

Some employers might indeed be tempted to use bankruptcy to deny labor the fruits of collective bargaining. But the Supreme Court had good reason to conclude that unions are as well protected from abuse as other creditors. If reorganization in bankruptcy is to work as intended, save both jobs and creditors' assets, labor contracts should remain part of the process.

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When Continental Airlines asked a bankruptcy court for protection against creditors last September, its unions contended that the company's main goal was escape from its labor contracts. The unions lost the argument in court, but their case struck a political nerve and the new Supreme Court decision isn't likely to ease the pain.

The Court said that a "somewhat stricter standard" should be applied to collective bargaining agreements than to other business contracts. But it rejected one lower court's view that labor contracts could be set aside only as a last resort. The Supreme Court instructed judges to strike a balance of equities in deciding how much sacrifice should be expected of various creditors, including unionized workers, to keep a company afloat.

The Court relied on its reading of existing law. But a deeper logic supports the judgment. Jobs can be preserved only if a company continues to operate. If wages are exempted from the bargaining in bankruptcy, troubled companies would have that much less to offer other creditors for their concessions. In the airlines, where labor contracts represent most of the uncollateralized debt, exempting unions would more quickly lead to liquidation rather than reorganization.

The unions say they can be asked to save jobs with voluntary concessions. But saving jobs is not always a union's first concern. At Continental, the national unions were more worried that wage concessions would set a precedent for reopening contracts with other airlines. That may be why Continental's union members were given no chance to vote on the company's last offer before it chose bankruptcy.

Organized labor, sensing that its best shot in an election year lies in a quick vote in Congress without even committee hearings, has proposed an unworthy deal. It would support conservatives who want to remove bankruptcy protections from consumers if they will let the House rush its vote on the labor amendment. The unions would then lobby to have House and Senate conferees accept the amendment, bypassing a direct test in the more hostile Senate.

There may indeed be room here for constructive reform. Unions might be required to let members vote on proposed concessions when their employer contemplates bankruptcy. Unions might be assured an expedited judicial review of concessions drawn from them by bankruptcy judges. But these ideas need discussion. No worthy reforms can come out of the backroom maneuvering now under way. The House leadership should hold out for a more deliberate process.

WASH POST

3/21/84

Debating Bankruptcy

THIS AFTERNOON, the House will take up bankruptcy legislation under deadline pressure and a severely restricted rule. The bill is designed to keep the bankruptcy courts going after March 31. They have been in a state of limbo since a Supreme Court decision last year invalidated part of the 1978 Bankruptcy Act.

The bill—introduced only Monday—deals with three main issues: the terms and duties of bankruptcy judges, the rights of the consumer credit industry and the status of collective bargaining agreements in bankruptcy. On the union contract question, in particular, the rule allows no separate vote, so members will be forced to choose a bill with this provision or no bill at all. It's not going to work.

The labor provision is not the kind of noncontroversial measure that can be passed without hearings, committee reports, floor debate and a vote. The proposal would overturn a Supreme Court decision in the case of *NLRB v. Bildisco*, decided only last month. In that case the court held unanimously that labor contracts that were a burden to a bankrupt employer and could not be adjusted at the bargaining table could be abrogated in the course of a bankruptcy reorganization. The House bill provides that such a contract could only be rejected to prevent the complete failure of the employer's financial reorganization.

Congress may well choose to amend the Bankruptcy Act to give special protections to labor contracts, but that would be a mistake. The point of reorganization in bankruptcy is to save the debtor and, in turn, the jobs of those who work for him. If a union contract is enforced inflexibly and the company goes under, the workers will have made a point and lost their jobs. The House rule will deny members the opportunity to vote on this important policy question.

The best course for House members today is to reject the rule and hold out for open debate. In the long run, that's the fastest and fairest way to proceed.

The New York Times

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Bankrupt on Bankruptcy

For two years Congress has had the simple but important task of establishing efficient, constitutionally sound bankruptcy courts. Both political parties are failing that assignment, shabbily surrendering to special interests led by unions and the consumer credit industry.

The job was simple because no massive new bankruptcy code was needed. All Congress had to do was respond to a Supreme Court decision that struck down one disturbing feature of the bankruptcy reform law of 1978.

It was especially important to complete the task at a time of mounting financial failures. The stronger the bankruptcy system the more effective the rescue of foundering firms and individuals, and the fairer the distribution of debts to creditors.

Instead, Congress is belatedly rushing to create an awkward, two-tiered Federal judicial structure that will prolong litigation and increase court costs.

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The 1978 reform was worthwhile but flawed. It created a special bankruptcy court with vast powers to settle all the legal problems of a failing business or individual in one tribunal. But bankruptcy judges were denied the guarantees of independence that the Constitution requires for Federal judges — lifetime tenure during good behavior, security from salary cuts. To let judges with limited security wield such far-reaching authority was unconstitutional, the Supreme Court said.

Last year the House Judiciary Committee responded with a clean proposal giving bankruptcy jurists life tenure and secure pay, somewhat lower than that of other Federal judges. Then the consumer credit industry persuaded the Senate to add provisions that would make it harder for installment debtors to gain forgiveness. Then farmers obtained new rules for grain elevator failures. Then shopping center owners got new rules for dealing with failed tenants.

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Now the House has hung organized labor's plum upon the Christmas tree. In a floor amendment, with no hearings and little debate, it voted to change law as interpreted only last month by the Supreme Court so that courts would now be forbidden to abrogate labor contracts with companies seeking to reorganize in order to avert formal bankruptcy.

To complete the mischief, the House joined the Senate in sabotaging the original assignment — streamlining the court structure. In this it was egged on by the Federal judiciary, which fears that 227 new lifetime judges will dilute the prestige of those already on the bench. The pending bills would staff bankruptcy courts with untenured judges, whose most important decisions would therefore have to be completely reviewed by Federal district judges.

In the effort to resolve differences between equally disgraceful Senate and House bills, the only question now is whether to set limits on the provisions for labor, installment creditors and other special [illegible] The citizen's best hope is for no law at all, a true confession of Congress's insolvency.

JOHN N. ERLENBORN
13th District, Illinois

Committees:
Government Operations
Education and Labor
(Ranking Republican Member)

Congress of the United States
House of Representatives
Washington, D.C. 20515

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Rayburn House Office Building
Phone: (202) 225-[illegible]

Congressional District Office:
911 North Elm Street
Hinsdale, Illinois 60521
Phone: (312) [illegible]

April 4, 1984

Honorable Don Nickles
SH713 Senate Office Building

Dear Don:

In conjunction with the joint hearings scheduled by the Senate Judiciary and Labor and Human Resources Committees, I am forwarding for your consideration my analysis of the House language in H.R. 5174 to overturn the Supreme Court's ruling in NLRB v. Bildisco & Bildisco, Debtor-in-Possession.

The Bildisco case has been widely misrepresented and misinterpreted. The crux of the issue involves the balancing of our national policy of encouragement and protection of the collective bargaining process with the need to avoid the job losses and economic dislocations resulting from business failures.

In my judgment, the Supreme Court was principally concerned with maintaining this balance and the decision, therefore, represents good public policy.

Please give it and my analysis your careful consideration. I believe they will convince you that Bildisco could save jobs and that tampering with it could have the opposite effect.

Sincerely yours,

John N. Erlenborn
Ranking Republican Member
Committee on Education and Labor

JNE:srs
Enclosure

H.R. 5174

BANKRUPTCY BILL

BY

HON. JOHN N. ERLENBORN

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

MARCH 21, 1984

Mr. Chairman:

. . . .

I would like to address my remarks to the part of the bill (H.R. 5174) that would overturn the Bildisco decision (N.L.R.B. v. Bildisco and Bildisco, Debtor-in-Possession, _________ U.S. ___ ______, 52 USLW 4269, decided on February 22, 1984.)

. . . .

The Bildisco case was decided by a unanimous Supreme Court concerning a case that originated under the National Labor Relations Act. On only one of the issues before the Court was the Court divided.

The Court made three basic decisions in the Bildisco case:

1) an executory labor contract can be set aside in a Chapter 11 (Reorganization) proceeding on a showing that the labor

contract "burdens the estate" and that "the equities balance in favor of rejecting the labor contract";

2) financially troubled employers may reject labor contracts prior to a reorganization ruling by the bankruptcy courts; and

3) the financially distressed employer does not commit an unfair labor practice when it rejects its labor contract after it files for reorganization under Chapter 11.

Those rulings may appear harsh and unfair to labor at first glance. When the reasoning behind those rulings and alternatives are considered, those decisions clearly are fair, compatible with existing law and policy, and rational in all respects.

It should be remembered that the stigma of filing for bankruptcy, whether Chapter 7 (Liquidation) or Chapter 11 (Reorganization), is not an attractive option. Bankruptcy, though, has been a fact of life for both business and individuals for some time.

Action under the Bankruptcy Code by a debtor to reject or abrogate executory contracts is a longstanding practice. It has only recently become controversial as the recession and deregulation have prompted more bankruptcy filings, particularly as deregulation has affected competitive labor costs. This has come about because those highly regulated and visible industries have recently been subject to deregulation; consequently, forcing new competition, often nonunion. These new companies have created jobs without the high wages and salaries formerly passed on to the consumer by the recently regulated companies. While these jobs are being created, the old regulated companies need time to meet this new competition, and possibly face financial distress. When that distress time comes they need time and flexibility to reorganize in order to save the company as well as the jobs in those distressed companies.

As to the standard used for setting aside an executory labor contract in a reorganization proceeding, the unanimous Bildisco Court rejected a more lenient test -- the "business judgment" test -- than the standard adopted. The "business judgment" standard is the traditional test used to authorize rejection of an ordinary executory contract, for instance contracts for goods and services. The Court also rejected a more stringent test urged by organized labor, the "REA Express"[1] test, a test enunciated by the Second Circuit in a case arising under the Railway Labor Act. That test would allow the labor contract to be set aside only if the alternative were liquidation. In rejecting the "REA Express" test, the Court concluded that it was "fundamentally at odds with the policies of flexibility and equity built into Chapter 11."

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[1] Brotherhood of Railway Employees v. REA Express, Inc., 523 F. 2nd 164, cert. denied, 423 U.S. 1019 (C.A. 2, 1975)

The test the Court adopted, in a 9-0 decision, was a "balancing of the equities" standard.[2] The Court stated that rejection of a collective bargaining agreement should be permitted "if the debtor can show that the collective bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." This standard requires that the debtor has made reasonable efforts to negotiate a voluntary modification and that those efforts are not likely to produce a prompt and satisfactory solution.

By adopting the "balancing of the equities" standard, the Court applied a stricter test than is applied to other executory contracts and considered the success of the reorganization to be the primary goal. Focusing on the success of reorganization and the flexibility needed to achieve reorganization, it is clear that the court intended that jobs and benefits be saved, if possible, with all creditors sharing to some degree sacrifices to meet that objective. Under the strict "REA Express" standard, it could be expected that most, if not all, jobs and benefits would be lost. Furthermore, under the strict "REA Express" test, organized labor would not have to suffer equally with other workers or creditors.

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[2] That standard was set out in a case arising in the Second Circuit under the NLRA, entitled National Labor Relations Board v. Kevin Steel Products, Inc., 519 F. 2nd 698, 1975. That standard was followed in the Third Circuit, In re Bildisco, 682 F. 2nd 72 (C.A. 3, 1982) certiorari granted by the Supreme Court, and in the Eleventh Circuit, In re Brada-Miller Freight System, Inc., 702 F. 2nd 890 (C.A. 11, 1983).

The Court also allowed rejection of the labor contract prior to Bankruptcy Court judgment. Great latitude is needed in making decisions under reorganization, and a debtor-in-possession has until the reorganization is confirmed to decide whether or not to reject the labor contract. Again, the Court majority stressed successful reorganization as the primary objective stating that the "fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."

In allowing rejection of the contract after filing, but prior to judgment, the Court noted that if the debtor-in-possession continues to receive benefits from the other party to an executory contract pending its decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services. In other words, the financially troubled employer must continue to pay reasonable wages and other benefits.

In deciding that an employer who files under chapter 11 does not commit an unfair labor practice when it rejects its labor contract, the Court concluded that recovery may be had only through administration of the claim in bankruptcy. Certainly, if the employer filed for reorganization under the Bankruptcy Act when not facing financial distress and only to avoid a labor contract, the decision of the Court would have been different. But, when an employer is financially distressed, the National Labor Relations Board cannot enforce the labor contract through the pretense of an unfair labor practice once the filing of a petition in bankruptcy has occurred. To rule otherwise may result in liquidation, rather than reorganization. This ruling has not relieved the debtor of the obligation to bargain over terms and conditions of employment during reorganization, nor does it preclude the union from withholding its labor if dissatisfied with the terms offered.

Organized labor has criticized the Supreme Court's decision. The AFL-CIO's Special Counsel stated: "The ruling obviously enhances the opportunity for union busting." Prior to the Court's ruling, our Subcommittees on Labor-Management Relations and Labor Standards held a joint oversight hearing on bankruptcy and collective bargaining. It was there asserted that Continental Airlines acted immorally, if not illegally, in filing for bankruptcy and rejecting its collective bargaining contracts. Since the Court's ruling, organized labor has asserted that the bankruptcy law is used for "union busting."

These claims just do not accord with the facts. Subsequent to our oversight hearings, a bankruptcy judge found that Continental had lost $521.9 million over a five-year period and ruled that Continental had no acceptable alternative if it expected to keep the airline flying -- "the court further finds that there was no intent or motive to abuse the purpose of the Bankruptcy Code." Furthermore, while there were 5,765 filings for bankruptcy reorganization in 1980, ballooning up to 17,608 in 1983, testimony at our oversight hearing produced allegations of only two instances of findings that an employer filed strictly for the purpose of escaping a labor contract. In those two alleged instances, before Bildisco, the Bankruptcy Court refused to approve the petition. This is certainly not a wholesale abuse of the bankruptcy law to "bust" unions.

Mr. Chairman, the proposal to overturn Bildisco is as dangerous to the welfare of workers as it is to financially distressed employers. The proposal to "reverse" Bildisco is that, and much more.

In the first instance, Congress, in 1978, noted the differences in collective bargaining under the Railway Labor Act and the National Labor Relations Act and set forth that difference in the statute. The "REA Express" test was decided under the policies of the Bankrupt Act as they related to the Railway Labor Act. The bill we are considering, H.R. 5174, would now apply the Railway Labor Act "REA Express" test to all collective bargaining contracts, even contracts under the National Labor Relations Act. While Congress six years ago recognized the difference of collective bargaining under those two labor acts, the bill before us now would not recognize the difference. Furthermore, the "balancing of the equities" test under Bildisco would be replaced in H.R. 5174 by a test more stringent than the "REA Express" test. The new test would be that labor contracts could not be rejected unless "any financial reorganization of the debtor will fail" and adds an additional test that "jobs covered by such agreement will be lost." "REA" did not include this second test. This type of standard assures organized labor that labor contracts could not be set aside in reorganization, even when excessive labor contracts initiated the reorganization filing. It would appear that the proposed standard would encourage filings under Chapter 7 liquidation, and therefore, all jobs would be lost.

Additionally, the proposed amendment would make labor contracts enforceable after filing and until rejected by a Bankruptcy Court. The "REA Express" Court did not require prior Court approval for rejection of contracts. When the proponents of H.R. 5174 contend they only want to apply the more stringent "REA Express test," why do they then go beyond "REA" and require prior Court approval for rejection?

Under H.R. 5174 it appears debtors-in-possession cannot move to reject, only trustees. In explanation of this language, Chairman Rodino has explained that both "trustees" and "debtors-in-possession" can move to reject the contract. However, the actual language of the bill confines the rejection process only to "trustees." What sort of mischief can be achieved, or is being achieved without the benefit of usual hearings and mark-up?

A provision that allows rejection only after the Bankruptcy court has ruled removes the flexibility that a financially distressed employer needs to reorganize its business. It also removes any incentive for bargaining by organized labor, and permits those organized to escape from sharing in any sacrifices needed to get the employer back on its feet. The expedited procedures called for in H.R. 5174 for Bankruptcy Court rulings offer no relief since a union may delay its perusal of the offered financial information and there is no time limit imposed on the judge to issue a decision on rejection. Even if reasonable time limits could be set, those limits may be too long for an employer in a crisis situation. The Continental Airlines case is an example. Continental had only about eight days until it would have gone into liquidation.

There are other ways H.R. 5174 goes beyond overturning Bildisco; for instance, H.R. 5174 gives administrative priority to wages and salaries while the REA Express standard did not. H.R. 5174 incorporates the National Labor Relations Act's standard of "good faith" bargaining by employers, but inconsistent with the National Labor Relations Act does not require that same standard for the representative of the employees.

From all I have stated, it is obvious that there are misinterpretations of: (1) the Bildisco case; (2) labor law; and (3) bankruptcy policy, all complex and difficult issues to understand. Let me illustrate just one instance of misinterpretation: Chairman Rodino's fact sheet accompanying his Dear Colleague letter announcing the introduction of the bill stated that the Bildisco decision does not give special weight to collective bargaining interests. However, that is exactly what Bildisco did! Labor contracts under Bildisco are subject to a more stringent "balancing of the equities" test than are other executory contracts, subject only to the business judgment test.

It is because of wide differences of opinion and interpretation that we should not act in haste. We should act only after following the usual House proceeding of hearings and mark-ups. We should act in a democratic manner. We should not have the wrong conclusions foisted upon this country's industry or labor.

In summary, I urge this House to reject H.R. 5174 overturning Bildisco because:

1) The Bildisco case involved highly technical areas of both bankruptcy and labor law;

2) Bildisco also involved complicated policy accommodations between bankruptcy and labor law;

3) Bypassing the hearing process in an attempt to overturn Bildisco only does the Congress and the public a disservice;

4) Despite press accounts to the contrary, there are no known "union busting" abuses of the reorganization procedures of the Bankruptcy Act;

5) Bildisco sets a higher standard for rejection of union contracts in reorganization than the standard for other executory contracts, subordinating the interests of other creditors;

6) The present proposal, H.R. 5174, goes beyond overturning Bildisco, discourages reorganization, and will, in effect, cause more filings for Chapter 7 liquidations; and

7) A careful reading of the Bildisco case will convince you that the Supreme Court's decision was in the best interest of maintaining jobs and other benefits for union workers.

In my opinion, the Supreme Court balanced the policies of the Bankruptcy Act, enabling a debtor to restructure his business to be able to continue operating, against the goals of the National Labor Relations Act, stability in collective bargaining, in a manner that attempts to ensure the employer's economic survival, consequently, saving jobs and other benefits for all workers.

The main reasons this bill should be defeated are because: (1) most of my colleagues have never heard of Bildisco, some have only heard of the case in the last day or two, and none of us knew of it until one month ago; and (2) the language of the bill was only available to all my colleagues in the House late yesterday afternoon.

This is not the way to legislate.

The **Chairman**. Senator DeConcini.

Senator **DeConcini**. Could I only bring to the attention of the chairman that there is a memorial service for former Senator Church, and the transportation leaves at 10:30. I would like to attend that, but I do not want to miss these hearings. Is there any possibility?

The **Chairman**. I mentioned at the beginning that I know it is Senator Church's funeral, and we had this set up, and there was no way I could cancel it with all the witnesses coming in from out of town and elsewhere. So I plan on going straight through, Senator DeConcini. What I want to do is get this on the record. I will certainly try and ask the questions for all of us, if you are not here. But I feel badly about not being there myself.

I do not know any other way to do it because of the effort that has been put forth to have this hearing. But I do understand that many Senators want to go to this funeral.

Senator **DeConcini**. How long a hearing do you anticipate?

The **Chairman**. I am hopeful that it will be through by the end of this morning. It looks to me like it will go to 1 or 1:30. I am willing to sit straight through in order to accommodate witnesses. I apologize. I just do not know what else to do.

Senator **DeConcini**. We cannot do the hearings this afternoon? We could not start them back up at 2 o'clock?

The **Chairman**. We have conflicts. There are policy committee conflicts in the Republican Party, caucuses in your party, and I have conflicts this afternoon myself.

Senator **DeConcini**. Well, I have a calendar this afternoon, too, but I would make some alterations to be here, back at 2 o'clock after the policy meeting.

The **Chairman**. I will keep this going until 12 or 12:30. If we are not finished, I will then defer until after 2 o'clock, and I will rearrange my schedule also.

Senator Dole.

STATEMENT OF HON. ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator **Dole**. Thank you, Mr. Chairman. I have a statement I would like to put into the record.

As I understand the issue—and we have been spending some time on this matter, along with some others—there are a couple of issues of primary concern.

The first is whether or not a debtor business should be able, unilaterally and without prior court hearing, to reject a collective-bargaining agreement, as is now permitted by the *Bildisco* decision. That is the very thing you object to.

The second is whether or not the standard enunciated in that decision for the court to apply in approving a rejection, which is a balancing-of-the-equities standard, should be changed in favor of a more restrictive test that would require a finding that rejection is essential to the success of the reorganization.

Obviously, we have a different view from labor on the one hand and business on the other. We are in the process, we are hopeful, of trying to work out some compromise. I assume that is the posture of the Teamsters here this morning.

Mr. PRESSER. That is right.

Senator DOLE. A willingness to try to hammer out some agreement. I think one thing that bothers many of us is a provision that crept into the bill in the late hours about retroactivity, which I would oppose and which I think many others would oppose. Is that a sticking point with your group?

Mr. PRESSER. Yes. It is not retroactivity. It was to become law upon enactment and by being signed is law. Then we believe it is law. Until then, it has been left out in the open air. It is for people who will make decisions who do not even know what they are making decisions on.

If you have a company that has 400 or 500 employees and calls them into a meeting hall in an office and tells them that unless they do the following he is going to file for bankruptcy: They must take a $4-an-hour cut, they must give up their holidays and their vacations, their seniority is gone, health and welfare and pensions are gone, their job security is gone, the contract is gone. To me, that does not sound like you can put that in a bankruptcy judge's hands, and the decision is made overnight or in a week or 10 days and it is all over. That just cannot prevail, in my opinion.

Senator DOLE. Then you are opposed to the House provision?

Mr. PRESSER. On that basis, yes, I certainly am.

Senator DOLE. It seems to me that if everything else fails, what we should do in the Senate is to pass a bill without the House provision and go to conference with nothing, and then work out something between the House provision and nothing.

Mr. PRESSER. Senator Dole, prior to your getting here, we put into the record that we would be happy to meet with any committee and work day and night to try to achieve what should be done for both sides to have proper representation and protection. We are willing to stand on that.

The CHAIRMAN. Senator Dole, could you yield for one clarifying question?

Senator DOLE. Yes.

The CHAIRMAN. You understand that even under the so-called compromise amendment that we had worked on, that although that would make the pending cases subject to the supposed new law, since we have a balancing-of-the-equities standard maintained out of *Bildisco*, in that compromise, you understand that some of those pending companies would be able to argue balancing of the equities, that they literally should be permitted to reject their collective-bargaining agreement?

Mr. PRESSER. That is the nice thing about America: anybody can argue.

The CHAIRMAN. Go ahead.

Senator DOLE. Let us just take Continental, for example. They are going to have to go back and relitigate, if what you suggest should be approved; is that correct?

Mr. BAPTISTE. If I may, Senator, as I understand the status of the Continental litigation, Continental has not as yet had a hearing on the motion to reject its collective-bargaining agreement. That is my understanding of the status of the litigation. Our position, as reflected in Mr. Presser's statement, is that the date of enactment should be the rule to be applied in this case, which as I understand the law as set forth by the Supreme Court, is the normal rule. The provision in the House bill, H.R. 5174, is the exception. That provision provides that the amendments are applied only to those bankruptcies filed after the date of enactment.

We feel that establishes different standards in the law and gives preferential treatment to those employers who have filed prior to enactment. We think that the date of enactment language that we agreed to earlier is the more fair standard and has the advantage of having everyone being subject to the same rule of law. If there is any manifest injustice that results from that application, that is a matter for the courts to resolve, not Congress.

Senator DOLE. Many times we pass legislation that is effective on the date of enactment, but we have what we call transition rules that take care of certain cases. Maybe that might be an opportunity for what some would say is mischief but others would say may be resolving a difference of opinion. Is there any difference between your views and the AFL-CIO?

Mr. PRESSER. I have not been in contact with the AFL-CIO, Senator. I do not know what their views are. I know I am here today.

Senator DOLE. You do not communicate with them?

Mr. PRESSER. I do not know what their views are, Senator.

Senator DOLE. I notice they are on the witness list.

The CHAIRMAN. We will all know in a few minutes.

Senator DOLE. If you hang around, you will find out what they think.

Mr. PRESSER. I will hang around.

Senator DOLE. I do not know. I thought maybe sometimes labor agreed, like business sometimes agrees.

Mr. PRESSER. We have not been called up for our opinion, Senator. So we really do not know.

Senator DOLE. That is encouraging. I think the point I would make in my statement is that there ought to be some resolution of this. We have 20-some days remaining.

The CHAIRMAN. We have a very short timeframe in which to resolve it. I felt we came very close.

If I could, Senator Dole, let me ask you, Mr. Baptiste. As I understand that compromise, we maintained the balancing-of-the-equities standard. So in Continental's case, although they had not had a hearing on whether or not their unilateral abrogation was all right, under *Bildisco* it was, they would still have all their rights protected when that matter came up before the bankruptcy court. Is that correct or is it not?

Mr. BAPTISTE. If I may, I think you just proved the point about how lawyers maintain full employment. I do not agree that what we agreed to maintains the *Bildisco* standard.

The CHAIRMAN. No, no. It maintains the balancing-of-the-equities standard.

Mr. BAPTISTE. I do not agree there, because we added a few factors, you will recall. [Laughter]

At least that is what I thought I was doing.

The CHAIRMAN. Let me restate that. [Laughter]

The fact is, there is a balancing-of-the-equities standard. We can agree that it is not exactly the same as *Bildisco*, but Continental still has its rights to make its case.

Mr. **Baptiste**. Oh, absolutely. No question about that. My point was, and as Senator Specter had pointed out earlier, that one of the major hangups in attempting to resolve the issues is the standard. Everyone seems to be wedded either to the *Bildisco* standard on one side or the REA Express, and some people try to cut the baby in half. That is unfortunate. What we tried to do was reach a more practical test and not be wedded to one or the other because each of the standards almost takes on a symbolic significance for the combatants in this process. What we attempted to do was to reach a more practical resolution of adding factors such as the participation of other parties in the sacrificing, if you will, to the ultimate survival of the company and adding the information that would enable the union to be able to assist the company in its survival.

I think frankly, as Mr. Presser pointed out in his statement, locking people in the room, much the same as we do in attempting to reach a collective-bargaining agreement against a strike deadline, I think that is really what you are ultimately going to have to do. Just lock the respective parties in a room and see if they cannot hammer out some language in order to get this process going. As Senator Dole points out, the days are running out again for resolving this.

Senator **Dole**. I would just make the point, I think many of us are willing to do that, but I do not think we should clarify it any more, though.

[The prepared statement of Senator Dole follows:]

STATEMENT OF SENATOR ROBERT DOLE:

HEARINGS ON THE SUPREME COURT DECISION IN THE CASE OF N.L.R.B. V. BILDISCO

AT THE OUTSENT, I WOULD LIKE TO COMMEND SENATORS THURMOND AND HATCH FOR CONVENING THIS JOINT HEARING OF THE LABOR AND JUDICIARY COMMITTEES FOR THE PURPOSE OF EXAMINING THE ISSUES THAT ARE RAISED BY THE SUPREME COURT'S RECENT DECISION IN THE CASE OF *N.L.R.B. V. BILDISCO*. IN THAT CASE, THE COURT FOR THE FIRST TIME GRAPPLED WITH THE QUESTION OF THE STANDARDS THAT APPLY TO THE REJECTION OF A COLLECTIVE BARGAINING AGREEMENT IN BANKRUPTCY. NEEDLESS TO SAY, THE COURT'S ACTION CAME AT AN OPPORTUNE TIME FOR THOSE WHO WERE TROUBLED BY IT'S MAJOR HOLDINGS, AS CONGRESS HAS UNDER CONSIDERATION OMNIBUS BANKRUPTCY REFORM LEGISLATION.

IN THE COURSE OF ASSEMBLING THE MAJOR COMPONENT PARTS OF THE REFORM PACKAGE THAT HAS NOW BEEN ACTED UPON -- ALBEIT IN DIFFERENT VERSIONS -- BY THE HOUSE AS WELL AS THE SENATE, WE IN THE CONGRESS HAVE FOUND IT NECESSARY TO RECONCILE THE VIEWPOINTS OF A HOST OF PARTIES INTERESTED IN BANKRUPTCY REFORM WHO WERE, IN THE BEGINNING, UNALTERABLY OPPOSED TO EACH OTHER'S POSITIONS. THIS WAS TRUE ON PROVISIONS OF THE PACKAGE THAT DEALT WITH CONSUMER DEBTOR ISSUES, GRAIN ELEVATOR BANKRUPTCIES, AND THE FUTURE STRUCTURE OF THE BANKRUPTCY COURTS. YET, WE WERE ABLE -- AS WE OFTEN ARE -- TO FIND COMPROMISES THAT SATISFIED THE BASIC CONCERNS OF ALL GROUPS WHILE PRESERVING THE ESSENTIAL THRUST OF THE REFORM EFFORT. I AM HOPEFUL THAT WE WILL BE ABLE TO DO THE SAME WITH REGARD TO THE ISSUES SURROUNDING REJECTION OF COLLECTIVE BARGAINING AGREEMENTS; AND AS MEMBERS OF THESE COMMITTEES ARE AWARE, I HAVE HAD MY COMMITTEE STAFF AT WORK FOR SOME WEEKS ON VARIOUS COMPROMISE PROPOSALS THAT WOULD PROVIDE SOME ADDED PROTECTION FOR COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY WHILE NOT ESTABLISHING NEW STANDARDS THAT WOULD BE TOO TOUGH FOR

TROUBLED BUSINESSES TO MEET.

TWO ISSUES ARE OF PRIMARY CONCERN. FIRST, WHETHER OR NOT A DEBTOR BUSINESS SHOULD BE ABLE TO UNILATERALLY, WITHOUT PRIOR COURT HEARING, REJECT A COLLECTIVE BARGAINING AGREEMENT -- AS IS NOW PERMITTED BY THE BILDISCO DECISION ; AND SECOND, WHETHER OR NOT THE STANDARD ENUNCIATED IN THAT DECISION FOR THE COURT TO APPLY IN APPROVING A REJECTION -- WHICH IS A BALANCING OF THE EQUITIES STANDARD -- SHOULD BE CHANGED IN FAVOR OF A MORE RESTRICTIVE TEST THAT WOULD REQUIRE A FINDING THAT REJECTION IS ESSENTIAL TO THE SUCCESS OF A REORGANIZATION. OBVIOUSLY, LABOR INTERESTS WOULD LIKE TO SEE ENACTMENT OF LEGISLATION THAT WOULD WRITE NEW LAW IN BOTH OF THESE AREAS; WHILE BUSINESS INTERESTS ARE NATURALLY OPPOSED TO ANY CHANGES AT ALL. IN LIGHT OF THE POLITICAL REALITIES WHICH SURROUND THIS LEGISLATION, IT IS PROBABLY UNREALISTIC TO EXPECT THAT EITHER OF THESE TWO EXTREME VIEWPOINTS WILL PREVAIL. THE HEARINGS TODAY SHOULD SERVE THE PURPOSE OF INFORMING THOSE OF US WHO MUST DRAFT THE COMPROMISES EXACTLY WHERE THE PARAMETERS OF " THE ART OF THE POSSIBLE" LIE IN THIS CASE.

I WOULD SUGGEST THAT , IF ALL CONCERNED PARTIES WHO ARE HERE TODAY WILL LEAVE THE HEARING ROOM WITH A COMMITMENT TO GIVING FAIR CONSIDERATION TO ANY PROPOSALS THAT ATTEMPT TO FIND THE MIDDLE GROUND, WE WILL BE ABLE TO DRAFT LANGUAGE THAT ADDRESSES THE LEGITIMATE CONCERNS OF LABOR WHILE PRESERVING THE EXPEDIENT AND FLEXIBLE PROCEDURES AND STANDARDS THAT NOW APPLY IN THE BANKRUPTCY COURTS' CONSIDERATION OF APPLICATIONS TO REJECT COLLECTIVE BARGAINING AGREEMENTS. IT SEEMS TO ME THAT LABOR'S PRIMARY INTEREST MUST BE TO ENSURE THAT A BANKRUPT COMPANY THAT IS TRULY

IN NEED OF RELIEF FROM THE STRICT CONDITIONS OF A COLLECTIVE BARGAINING AGREEMENT IN ORDER TO SURVIVE UNTIL A PLAN OF REORGANIZATION CAN BE CONFIRMED OBTAINS THAT NEEDED RELIEF, WHILE PRESERVING AS MUCH OF THE EMPLOYEE BENEFITS AND PROTECTIONS UNDER THAT AGREEMENT AS IT IS POSSIBLE TO RETAIN UNDER THE CIRCUMSTANCES. THIS IS ALSO IN THE INTEREST OF THE TROUBLED BUSINESS, SINCE IT IS TO THE ADVANTAGE OF THE BUSINESS ENTERPRISE TO RETAIN AS MANY OF THE TRAINED, MOTIVATED UNION EMPLOYEES AS IT IS POSSIBLE TO KEEP DURING A PERIOD WHEN QUICK RESPONSE TO CUSTOMERS' NEEDS IS ESSENTIAL.

I HAVE ADVANCED SEVERAL PROPOSALS TO BOTH SIDES THAT I BELIEVE WOULD ACCOMPLISH THESE OBJECTIVES WITHOUT REQUIRING AN IMPOSSIBLY STRICT STANDARD TO BE APPLIED BY THE BANKRUTPCY COURT, AS I BELIEVE THE HOUSE BILL DOES.

IN SUM, I AM HOPEFUL THAT THESE HEARINGS WILL PROVE TO BE A HELP, AND NOT A HINDRANCE, IN OUR EFFORTS TO ACHIEVE BANKRUPTCY REFORM; AND THAT THE WITNESSES TODAY WILL BRING MORE LIGHT THAN HEAT TO THE ILLUMINATION OF THE PROBLEMS THAT WE MUST SOLVE IN THIS AREA IN ORDER TO KEEP THIS BANKRUPTCY PACKAGE MOVING FORWARD. THAT WE WILL HAVE TO ADDRESS THESE QUESTIONS IN ORDER TO HAVE A BILL, I HAVE NO DOUBT.

The **CHAIRMAN**. Senator Quayle.

Senator **QUAYLE**. Thank you, Mr. Chairman. I want to compliment you for holding these hearings and for trying to get this matter out in the open. I think we may be in somewhat of a position, being under the gun, to get the various players in a room and have a little collective-negotiation and collective-bargaining session among ourselves.

Let me go back and make sure I understand what the argument is going to be. Mr. Presser, is it basically on the two issues of what in fact the standard is going to be before a contract can be unilaterally abrogated, and the date of enactment and the so-called retroactivity? Are those the two main issues?

Mr. **PRESSER**. The two main issues.

Senator **QUAYLE**. So as Mr. Baptiste recommended, perhaps when we get in these negotiations, we must decide whether we are going to be wedded to *Bildisco* or to another standard. There is going to have to be some give and take in coming up with this standard so that everyone can leave with something they got out of these negotiations and claim to be winners.

I think maybe we should proceed with this in mind and in this way, and hopefully, we will be able to arrive at some resolution. It looks to me, that the real sticking point is on the effective date of this legislation. Is that a fair statement on my part? Would you say that is the tougher of the two issues Mr. Presser?

Mr. **PRESSER**. Senator, I think the *Bildisco* decision is the toughest part about the entire thing.

Senator **QUAYLE**. I realize that, and that is what we are trying to deal with. We are trying to get down and work this thing out.

Mr. **PRESSER**. It is just one of the issues that is involved here. I recommended in my presentation that we do find a way to get this thing resolved. Mr. Baptiste repeated that in his statement. I believe that is the only way it is going to get resolved: we are going to have to find a way to negotiate this thing into a proper perspective.

Senator **QUAYLE**. If we have the date of enactment as the effective date rather than any later date, would this be directed basically at the *Continental* case or are there other cases out there?

Mr. **PRESSER**. There are cases. We have a company that last Friday filed for bankruptcy. They called all the people in and said, "Tomorrow morning, you buy all this equipment at $20,000 a tractor and become owner-operators or you don't have a job." We have 22-, 25-, and 28-year employees with this company. What does a man do who is 62 years old, who is going to go out on a pension in 6 or 8 months, and an employer tells him, "You will buy the tractor or your job is over, for a $20,000 investment"?

Senator **QUAYLE**. So you are saying that there are many companies, beyond Continental, that would be affected by the date we put in it?

Mr. **PRESSER**. Positively. We named some earlier.

Senator **QUAYLE**. I have been here for the last 15 minutes. I don't think you mentioned it.

Mr. **PRESSER**. We named many carriers that are already doing it.

Senator **QUAYLE**. If we use the date of enactment approach, would this mean that these pending cases would have to be relitigated?

Mr. Baptiste. No, not necessarily. The law, as enunciated by the Supreme Court, is that the normal rule is that the new law applies to all pending cases. In Continental's situation, as I understand the status of that litigation, Continental has not had a hearing, let alone a decision, on the motion to reject the collective bargaining agreement. Continental went in, just as many of the employers we have been dealing with—When they file for bankruptcy, they just literally rip up the contract and just do what they darned well please, regardless of what the contract said, without the benefit of having a court rule upon the necessity for it and whether there is any nexus between that contract and the employer's financial difficulties. That is what Continental did, and that is what a lot of the trucking companies that have attempted to take advantage of *Bildisco,* the Supreme Court decision, by merely taking unilateral action, and they do not file the motion to reject for a long period of time because they do not have any pressure to. They also do not have any pressure, under the current state of the law, to sit down and negotiate with the union, unless we get their attention by striking. Frankly, we are reluctant to do that, because obviously that is going to push the company closer to the brink. That is not helpful to the problem. But, when the employer pushes the union and the workers to the wall—I think you have seen some recent examples, where the American workers will stand up and we will strike, even though they are taking a chance on their livelihoods going down the drain. But that is what is happening.

Senator Quayle. So you are saying there is no way to give a specific answer on how many cases which are currently pending would be directly affected? Obviously, the *Continental* case would be affected. Are you saying there are a lot of others that would be affected?

Mr. Presser. I will just give you a couple of fast ones. Mason Dixon has 4,800 union employees and probably twice that in nonunion. Tucker Freight Lines, I think it is an 80-year-old company with 1,500 or 1,800 people. Midwest Emory with 1,800 or 2,000 or 3,000 people. I could go on and give you numbers. It is getting larger every day. Before you know it——

Senator Quayle. And this legislative would be corrective action to all those cases?

Mr. Presser. Sure.

Senator Quayle. So if the date of enactment is not put in, you are saying these companies could possibly go the way of *Bildisco?* Is that what you are contending?

Mr. Presser. They are taking advantage of the *Bildisco* decision right now. That is what they are doing. But let me say this to you, senator. If an employer anywhere in this country takes the *Bildisco* decision and decides to put his company through a bankruptcy, there is nothing in that *Bildisco* decision that stops those employees from staying out there on the picket line. They are doing that today. That is not the answer for the economy of this country.

Senator Quayle. That is why we are all here today.

Mr. Presser. That is right.

Senator Quayle. It seems, that the real sticking point to negotiations is going to be this second issue of retroactivity. That is why I bring it up, and I guess we will hear later on from the AFL-CIO.

The **Chairman**. If I could just add something to that, I understand that the date-of-enactment provision has been interpreted by the U.S. Supreme Court to apply to pending cases unless manifest injustice would occur. Now, if the entire purpose of a chapter 11 proceeding—namely, a rehabilitation of the business—would fail due to application of a *Bildisco* bill to a pending case. I just have to say I am confident that any court would not apply the new law in such a way as to defeat the bankruptcy code.

Moreover, if you think about it, if a bill were passed which preserved the current standard for rejection of contracts, its application to current cases would not amount to any change at all. See if you agree with this, Mr. Baptiste and Mr. Presser: Pending cases would be litigated under the same legal requirements.

Mr. **Baptiste**. That is correct, as set forth in that Supreme Court decision I cited earlier. As you point out, the court can make the determination as to whether applying the new standard might be harmful to the estate.

The **Chairman**. But in any event, they are not going to abrogate the bankruptcy code and ignore the fact that chapter 11 is for the purpose of helping failing businesses to survive.

Mr. **Baptiste**. That is right.

The **Chairman**. I would suggest that the date of enactment is an important issue, but there are even more important issues, and that is, what kind of a standard do we use? *Bildisco* really had a 9 to 0 opinion and a 5 to 4 opinion. The 5 to 4 is a much more difficult problem than the date of enactment, although it is a controversial problem.

Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator **Grassley**. Thank you, Mr. Chairman.

First of all, I have a statement that I want to put into the record.

The **Chairman**. Without objection, so ordered.

Senator **Grassley**. Following up on Senator Quayle, I think it would be very beneficial if you could have your staff, either on their own or with the help of various people contact companies that are going through chapter 11 bankruptcy, so that we could talk to some of those companies officials and find out just what the individual situations are there.

The **Chairman**. Continental is on the witness list today.

Senator **Grassley**. That is just one company.

The **Chairman**. We will try to do that. I do not know how we are going to get all that information.

Senator **Grassley**. There ought to be some way we could get it.

The **Chairman**. Let's see what we can do.

Senator **Grassley**. The other point I would like to bring up with you, Mr. Chairman, is this. We are talking with the leadership of organized labor, but now in the case of Continental, as one example, there is a high percentage of the work force that is not unionized. They are in noncollective bargaining units.

The **Chairman**. Most of these companies are like that.

Senator **Grassley**. I think that those are jobs as well, and we need to be cognizant of their attitude toward the issue that is before us. We do not want to ignore a large share of the people who do not have a spokesman. I think we need to be concerned that the preservation of companies in chapter 11 bankruptcy is for the sake of jobs. One job, in my estimation, ought to be just as important as another. So I think if we are not going to have people on the witness list—and I don't see anybody on the witness list that maybe would take the point of view of nonunion employees, as far as their point of view on this is concerned—we ought to make some effort to find out the attitude of such people who are being affected.

If we do something dramatic that affects the opinion of organized labor, then we do injustice to other people who are affected. I think that is an important point, too.

The **Chairman**. Just to answer the Senator's question, we will have a representative of the chamber of commerce, the National Association of Manufacturers, the Small Business Legislative Council, the Honorable Ralph Mabey. I think all of these will talk about the nonunion people as well.

Senator **Grassley**. Those are management people, though. We have laboring people out there for whom I do not think the chamber of commerce speaks. Maybe the unions do speak for them, but they are not members.

The **Chairman**. What I am suggesting is, we do have some people in here who will speak for them. If the Senator desires to have any further witnesses, we will be happy to consider them.

Senator **Grassley**. First of all, let me make clear, even though maybe I am talking a little loudly, my point is not meant to be critical of the agenda. I am just pointing out that is a factor I see here.

The only question I have of the witnesses would be in regard to whether or not, if we do get an agreement—let us just suppose that we can sit down, whether in an open or a closed meeting, and come up with an agreement. Will you, as one leader of organized labor, or will organized labor generally put your full weight behind the bankruptcy bill to get it through the House of Representatives?

Mr. **Presser**. We agree to the formula, yes. We most certainly will.

Senator **Grassley**. Mr. Chairman, I have no further comments.

[Senator Grassley's prepared statement follows:]

Statement of Charles E. Grassley
April 10, 1984

Mr. Chairman, as a member of both the Judiciary Committee and the Labor Committee, I am here today to assess the arguments in favor of and against a quick decision by Congress to overturn a unanimous Supreme Court decision.

The Supreme Court issued the Bildisco decision on February 22, 1984. One month later the House passed a bill that contained provisions to overturn that decision. Not since the 1948 Portal to Portal Pay case (Anderson v. Mt. Clemonts Pottery), a decision also involving organized labor, has Congress so quickly entertained, and one House succeeded, in voting to overturn a Supreme Court decision. Now, there are a number of Supreme Court decisions that I believe should be overturned. It strikes me that if only we could bring organized labor around on school prayer or balanced budget amendments, we might get somewhere!

With respect to the other provisions of the bankruptcy package we have a situation where there has been an ongoing dialogue in the Congress as to every proposal, be it the provisions relating to grain elevator bankruptcies, consumer credit provisions, shopping center bankruptcies or, of course, the actual jurisdiction that shall be applicable to the courts. And today we shall have a hearing on the provisions that were hastily inserted in H.R. 5174 pertaining to the treatment of collective bargaining agreements under bankruptcy law. I am hopeful that we can resolve this very difficult issue. Nevertheless, I believe that if we cannot come up with a set of standards that meets with both labor and management's satisfaction, we had better be prepared to pass S. 1013 and place the integrity and workability of the bankruptcy process ahead of special interests.

The CHAIRMAN. Thank you. Just to frame this issue, let me ask Mr. Baptiste this. As I understand it, prior to *Bildisco,* there was considerable confusion over the standard to be used to decide upon rejection of the collective bargaining agreement. For 9 years, for instance, in the Second Circuit Court of Appeals, the law was defined by the *REA Express* case. Do you agree with that?

Mr. BAPTISTE. I do.

The CHAIRMAN. REA Express basically permitted rejection only if necessary to save the particular business; is that correct?

Mr. BAPTISTE. Yes.

The CHAIRMAN. That, of course, limited rejections to situations only of dire necessity, where the company literally was going to fail. In other judicial circuits, however, the courts applied a variety of tests closer to what I would refer to as a business judgment test or a business judgment role, which applied to most executory contracts; do you agree with that?

Mr. BAPTISTE. That is correct.

The CHAIRMAN. Other courts generally permitted rejection of a labor contract if to do so would put the business back into a profitable posture; is that correct?

Mr. BAPTISTE. Yes.

The CHAIRMAN. There were some other courts that did that. Now *Bildisco,* it seems to me, really struck a middle ground. It permits rejection when a "balancing of the equities," that is, taking into account the interest of all parties concerned, justifies it.

Mr. BAPTISTE. In the Supreme Court, when *Bildisco* was argued, the solicitor general pointed out to the Supreme Court that the test that had been applied for many years under the code had been the *REA* test, and that was the test that the solicitor general argued to the Supreme Court should be applied. I think the question that you pose is probably dramatically demonstrating where some of the contending parties in this would sharpen their disagreements.

We feel—and the Supreme Court did not disagree on this point—that labor contracts should be treated differently. The Supreme Court has said so on any number of occasions. They are not your normal commercial contracts. What we have set forth in Mr. Presser's testimony is the position that labor unions are not saying that we are not going to sacrifice unless everybody else does first. What we are saying—and this is borne out by our experience in these bankruptcies because, as Mr. Presser pointed out, we have had a number of them caused, in our view, by deregulation of the transportation industries.

Our experience has been, when you force the parties to sit down at a bargaining table and deal in good faith, and particularly when you persuade the unionized workers that other people—not just them—are being asked to sacrifice—we are talking about management personnel, nonunion people, the trade creditors, the banking institutions—when you have the input of all these other parties, and they are making sacrifices, and the workers are not the only ones on whom the attention is focused—and that is where I think many of the positions harden on this issue, between employers and unions. People want one side or the other.

The balancing test that you describe is set forth in the Supreme Court decision. Unfortunately, it does not lend itself to that kind of a compromise. The court talks about balancing the equities, but it is almost an all-or-nothing proposition, and that is where we part company with some of the people on *Bildisco*. We feel that the middle ground should be somewhere along the lines that all parties should participate.

The CHAIRMAN. Between *Bildisco* and *REA*?

Mr. BAPTISTE. You see, that is part of the problem. Everyone wants to talk about, Do we do it this way, with this standard? The other uses the names. I would rather break new ground, if you will, and not use either of the standards that people mentioned, either *Bildisco* and *REA*, and come up with a formula that kind of blends the two, if you will. Stay away from the magic words, because that is where we get hung up, having gone through some of these long negotiations with members of your staff. And that is part of the problem in working out a compromise: Everyone wants their standard. What we ought to do is sit down and come up with a workable formula that is neither side's standard.

The CHAIRMAN. I want to thank you, Mr. Pressler, Mr. Baptiste, Mr. Locigno, and Mr. Climaco, for being with us today. I think you have succeeded in raising this to a level of real concern. It has been a level of concern in the Congress, and there are two sides to it. I am hopeful that we can resolve it, and I hope we can resolve it in a way that will perhaps either please everybody or have everybody not so pleased. That may be the only way to resolve this. It is a very important issue. The whole bankruptcy bill is a very important bill. We are sorry that this has to be part of that bill.

We have a Federal judiciary out there that we need to put some judges in, and we see a lot of problems there as well. But in any event, I am grateful you are here.

Senator Dole, do you have one other question?

Senator DOLE. I have no questions.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. The House added this provision to its bill which really does not concern the bankruptcy bill. It may be necessary for us to remove it from this bill and take some other action. However, if some reasonable compromise can be reached on the labor issue that the House included, I would like to see it done.

I would urge you, gentlemen, to be as reasonable as you can and to see if you can get together. I have asked Senator Hatch to try to negotiate this matter. See if you can reach agreement on it. If you cannot, we may have to go to the floor without a labor provision. I wanted to explain that to you. We may have to go ahead with a bankruptcy bill without these other provisions, these extraneous matters, coming into it. Thank you very much.

The CHAIRMAN. Senator Thurmond always has a unique way of exerting pressure on all parties. Thank you for coming. We appreciate having you here.

Our next witnesses will be Mr. Laurence Gold, counsel for the AFL–CIO, here in Washington; Mr. Bruce Simon, from Cohen, Weiss & Simon, out of New York City; and Mr. Robert Funk, United Food and Commercial Workers, here in Washington, DC.

Mr. Gold, we are happy to welcome you before the committee. We know that you have participated in these negotiations, and we are sorry we were not able to resolve the problems. We are happy to welcome you, Mr. Simon and Mr. Funk, as well. We will turn the time over to you, Larry.

STATEMENT OF LAURENCE GOLD, COUNSEL, AFL-CIO, WASHINGTON, DC, ACCOMPANIED BY BRUCE SIMON, COHEN, WEISS & SIMON, NEW YORK CITY; AND ROBERT FUNK, UNITED FOOD AND COMMERCIAL WORKERS, WASHINGTON, DC

Mr. GOLD. Thank you, Senator. We wish to proceed by summarizing our statement and then doing our best between the three of us to answer your questions. Mr. Simon has had extensive experience representing various AFL-CIO unions in chapter 11 proceedings, and Mr. Funk has had the responsibility of handling such proceedings that have involved the United Food and Commercial Workers Union, a union that has been heavily affected by this loss. So we will do our best to give you both the AFL-CIO's position and the benefit of their practical experience.

The AFL-CIO's position on the matter before this committee is that Congress should, as part of the Omnibus Bankruptcy Code Amendments now under consideration, adopt a provision along the lines of the proposed section 1113, title 11 of the United States Code, contained in H.R. 5174 as passed by the House, and should make that provision effective as of the date of enactment.

In essence, H.R. 5174 provides that a trustee or debtor in possession must abide by a collective bargaining agreement in force, pending a judicial determination approving rejection of the agreement; for an expedited procedure for the consideration of applications for the rejection of such agreements; for a process pursuant to which the trustee proposes modifications in the agreement needed for the reorganization and endeavors through collective bargaining to reach a meeting of the minds with the union; and a standard for determining whether rejection should be allowed, stating that the court must find that the trustee has complied with his bargaining obligations and that, absent rejection of such agreement, the jobs covered will be lost, and any financial reorganization will fail.

Initially, a few words on the Supreme Court's *Bildisco* decision are appropriate. First, the *Bildisco* opinion does not purport to be a statement of the ideally balanced standard in a perfect world for judging the propriety of an application for rejecting a collective bargaining agreement. The Court stated its holding, as follows:

"The standard which we think Congress intended is a higher one than that of the 'business judgment' rule, but a better one than that embodied in the *REA Express* opinion of the Court of Appeals for the Second Circuit."

That thought about Congress' intent, as the Court admitted, rests on a very slender foundation. The 1978 act does not treat the status of collective bargaining agreements in reorganizations, other than the status of Railway Labor Act agreements, at all. There is not a word in the 1978 statute or in its legislative history that so much as mentions the standards' issue.

Second, the *Bildisco* Court, in elaborating the balancing-of-the-equities standard, stressed, "The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization." In other words, the Court concluded that in light of what Congress has and has not said, it is the policy of chapter 11, not the national labor policy, that is to be considered paramount.

Third, the basis for Bildisco's holding that an employer may act unilaterally to change wages and working conditions prior to court approval of an application for rejection of a collective bargaining agreement again rests on the Court's understanding of Congress' intent: It seems to us that this difference between the two types of proceedings reflects the considered judgment of Congress that a debtor in possession seeking to reorganize should be granted more latitude in deciding whether to reject a contract than should a trustee in liquidation.

The upshot of the *Bildisco* decision, putting extraordinary situations to one side, is to give debtors a practical assurance that collective bargaining agreements may be repudiated with impunity, at least as long as there is some minimal attempt to negotiate with the union. The *Bildisco* standard is so open-textured as to provide no limitations on the court at all. The factors that standard requires to be consulted are extremely complex and inherently incommensurate, and the entire thrust of the reorganization proceeding in such situations is to give great weight to the debtor's expressed desires and to resolve all doubts in his favor.

We see no need to speculate at any length on the possibilities. It is sufficient that those who know their interest best, management and unions, divide as follows: The employer community praises the decision, and we condemn it. The winners and losers are plain enough.

Turning to the merits of the issue, there is nothing in logic or in natural law that requires the conclusion that collective bargaining agreements are to be included within the class of executory contracts governed by section 365 of the Bankruptcy Code. That undefined term was used by the bankruptcy judges to cover normal commercial contracts, long before the national labor policy evolved. As the *Bildisco* opinion rather grudgingly admits, it is well-settled that collective bargaining agreements differ for some purposes from ordinary contracts because collective agreements are of a special nature.

There are five considerations that justify special rules concerning the rejection of collective bargaining agreements along the lines stated in H.R. 5147.

First, the national labor policy is unique in setting the terms on which two parties must deal with each other, and in insisting that once an agreement is reached, its provisions must be respected for its term and that a repudiation is to be redressed not only by a private suit for damages but also by a public proceeding that provides full equitable relief, including mandated observance of the agreement. The purpose of these provisions of the National Labor Relations Act is to minimize industrial strife by promoting collective bargaining and by stabilizing the agreements reached as a result of bargaining. Those large public interests, none of which figure in commercial contracts context, cut against permitting debtors in possession to repudiate collective bargaining agreements.

Second, normally the employees covered by a collective bargaining agreement are entirely dependent on their wages and fringe benefits for their livelihoods. In contrast, the businesses that have entered into commercial contracts with a company that later goes into reorganization typically have many such contracts, the rest of which continue in force. The commercial contract, including the commercial loan, is priced to take into account a bad-debt factor. The price of labor is not. Thus, the overall effect of the repudiation of collective bargaining agreements is far harsher on the covered employees than the effect of a repudiation of commercial contracts.

Third, the basic premise of the collective bargaining system is that the labor market is the last option for sustaining oneself short of the dole, and that this harsh reality creates such an imbalance of power as to require adjustments to the competitive-market model. To the extent collective bargaining results in a wage that is different from the market wage, the system is working as intended. Thus, in this regard, too, permitting debtors in possession to repudiate a collective bargaining agreement to bring the wages of organized employees down to the lowest common denominator is contrary to the very essence of labor policy.

Fourth, while we have assumed to this point that the *Bildisco* rule pushes collective bargaining agreements down to the level of commercial contracts covering goods and services the debtor continues to need, that assumption understates the overall harm done by that decision. It is unlikely that the debtor's basic commercial contracts will be far from the market and that there will be a profit to the debtor in their repudiation. Thus, under *Bildisco,* a bankruptcy rule of relatively small moment with regard to the equivalent commercial situation is used to work a substantial inroad into collective bargaining.

Finally, the bankruptcy code provision preserving Railway Labor Act collective bargaining agreements shows that the *Bildisco* rule is not necessary to successful reorganization.

Finally, we do disagree with H.R. 7154 in one important respect. It is our position that Congress should follow its usual practice and make the bankruptcy code amendments effective upon enactment. It is the long-settled general rule in the American legal system that a law when enacted becomes applicable to everyone, wherever and however they may be situated, without favor or exception. This general rule was first announced by Chief Justice Marshall 183 years ago in *United States* v. *The Schooner Peggy,* and has been reaffirmed repeatedly, most notably in the *Bradley* v. *School Board* case already discussed in this hearing.

Those who allege that we seek some unfair retroactive law are either ingenuous or ignorant of the traditional view. Particularly in light of the split in the courts of appeal prior to the Supreme Court's *Bildisco* decision regarding the issues under consideration here, it can hardly be argued that anyone justifiably could have relied upon any single reading of the law. Any trustee or debtor who took any action betting on the outcome of the Supreme Court decision and the legislative process may have been daring but cannot be heard to complain if he bet unwisely.

[The prepared statement of Mr. Gold follows:]

No. 84-28

STATEMENT BY LAURENCE GOLD, SPECIAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS BEFORE THE SENATE COMMITTEE ON THE JUDICIARY AND THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES ON THE STATUS OF COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY REORGANIZATIONS

APRIL 10, 1984

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) appreciates this opportunity to testify on the status of collective bargaining agreements during a Chapter 11 reorganization. The Federation's position is that Congress should, as part of the omnibus Bankruptcy Act amendments now under consideration, adopt a provision along the lines of the proposed §1113 of title 11 of the United States Code contained in H.R. 5174 passed by the House of Representatives on March 21, 1984 and should make that provision effective as of the date of enactment.

In essence, H.R. 5174 provides: that a trustee or debtor in possession must abide by a collective bargaining agreement in force pending a judicial determination approving rejection of the agreement; for an expedited procedure for the consideration of applications for the rejection of such agreement; for a process pursuant to which the trustee proposes modifications in the agreement needed for the reorganization and endeavors through collective bargaining to reach a meeting of the mind with the union on such modifications; and a standard for determining whether rejection should be allowed stating that the court must find that: (1) the trustee has complied with his bargaining obligations; and (2) "absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the ~~debtor will fail.~~"

Before turning to a defense of that approach to meeting the just requirements of economically distressed employers in a manner that takes fair account of labor policy, it is worthwhile to put this matter into some perspective and that is best done by a few words on the Supreme Court's decision in *NLRB v. Bildisco & Bildisco,* ___ U.S. ___ (Nos. 82-818 & 852; Feb. 22, 1984).

First, the *Bildisco* opinion does not purport to be a statement of the ideally balanced standard in a perfect world for judging the propriety of an application for rejecting a collective bargaining agreement. The Court stated its holding as follows:

> We agree with the Court of Appeals below, and with the Court of Appeals for the Eleventh Circuit in a related case, *In re Brada-Miller Freight System Inc.,* 702 F.2d 929 (1983), that the Bankruptcy Court should permit rejection of a collective-bargaining agreement under §365(a) of the Bankruptcy Code if the debtor can show that the collective bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract. *The standard which we think Congress intended is a higher one than that of the "business judgment" rule, but a lesser one than that embodied in the REA Express opinion of the Court of Appeals for the Second Circuit.* [Sl. Op. p. 11, emphasis added.]

That thought about Congress' intent, as the Court admitted, rests on a very slender foundation. The 1978 Act does not treat with the status of collective bargaining agreements in reorganizations, other than Railway Labor Act agreements, at all. There is not a word in the 1978 statute or in its legislative history that so much as mentions the standards issue. Indeed, in *Bildisco*, the Court was reduced to drawing negative inferences from the contrast between this silence and the express preservation of Railway Labor Act collective bargaining agreements in §1167 and from the 1975 legislation concerning municipal bankruptcies. The 1975 Congress, it should be added, did not reject the REA Express standard in favor of any other, but merely recognized that there had been two Second Circuit opinions, REA Express and Kevin Steel. While the Bildisco Court treated those two Second Circuit opinions as being in conflict, the REA Express opinion, which is the later of the two, expressly rests on Kevin Steel and merely follows and elaborates on the earlier opinion.

Second, the Bildisco Court, having determined that Congress intended collective bargaining agreements to be considered as executory contracts and that the standard just quoted is to be applied in judging rejection applications, stressed that:

> The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. The Bankruptcy Court's inquiry is of necessity speculative and it must have great latitude to consider any type of evidence relevant to this issue. [Sl. Op. p. 13, emphasis added.]

In other words, the Court concluded that in light of what Congress has and has not said, it is the policy of Chapter 11, not the national labor policy, that is to be considered paramount.

Third, the basis for Bildisco's holding that an employer may act unilaterally to change wages and working conditions prior to court approval of an application for rejection of a collective bargaining agreement, prior to court approval again rests on the Court's understanding of Congress' intent: "It seems to us that this difference between the two types of proceedings reflects the considered judgment of Congress that a debtor-in-possession seeking to reorganize should be granted more latitude in deciding whether to reject a contract than should a trustee in liquidation." (Sl. Op. p. 14.) It follows ineluctably from that understanding of the bankruptcy law said the Court that

> [T]he filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again. Consequently, Board enforcement of a claimed violation of §8(d) [of the NLRA] under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space. See. H.R. Rep. No. 95-595, p. 340 (1977). We conclude that from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA §8(d). [Sl. Op. p. 17.]

The upshot of the Bildisco decision, putting extraordinary situations to one side, is to give debtors a practical assurance that collective bargaining agreements may be repudiated with impunity at least as long as there is some minimal attempt to negotiate with the union. The Bildisco standard is so open textured as to provide no limitations on the court at all; the factors that standard requires to be consulted are extremely complex and inherently incommensurate; and the entire thrust of the reorganization proceeding in such situations is to give great weight to the debtor's expressed desires and to resolve all doubts in his favor. Moreover, the Bildisco opinion leaves it quite unclear as to whether, in the normal case, where the debtor acts unilaterally and does not seek court approval of his action, there will be any evaluation at all of the debtor's action until the end of the proceeding when an overall plan of reorganization is presented. We see no need to speculate at any length on the possibilities. It is sufficient that those who know their interests best — management and unions — divide as follows: the employer community praises the decision and we condemn it. The winners and losers are plain enough.

There is nothing in logic or in natural law that requires the conclusion that collective bargainings agreement are to be included within the class of "executory contracts" governed by S365 of the Bankruptcy Code. That undefined term was used by the bankruptcy judges to cover normal commercial contracts long before the national labor policy evolved. And, as the Bildisco opinion rather grudgingly admits, it is well-settled that collective bargaining agreements "differ for some purposes from ordinary contracts" (Sl. Op. p. 7) because collective agreements are of a "special nature" (id. at p. 9). There are five considerations that justify special rules concerning the rejection of collective bargaining agreements along the lines stated in H.R. 5147.

First, the national labor policy is unique in setting the terms on which two parties must deal with each other and in insisting that once an agreement is reached its provisions must be respected for its term and that a repudiation is to be redressed not only by a private suit for damages but also by a public proceeding that provides full equitable relief including observance of the agreement. The purpose of these provisions of the NLRA is to minimize industrial strife by promoting collective bargaining and by stabilizing the agreements reached as a result of bargaining. Those large public interests, none of which figure in the commercial contracts context, cut against permitting debtors-in-possession to repudiate collective bargaining agreements.

Second, normally the employees covered by a collective bargaining agreement are entirely dependent on their wages and fringe benefits for their livelihood. In contrast, the businesses that have entered into commercial contracts with a company that later goes into reorganization typically have many such contracts, the rest of which continue in force. And the commercial contract, including the commercial loan, is priced to take into account a bad debt factor. The price of labor does not. Thus, the overall effect of the repudiation of collective bargaining agreements is far harsher on the covered employees than the effect of a repudiation of commercial contracts.

Third, the basic premise of the collective bargaining system is that the labor market is the last option for sustaining oneself short of the dole and that this harsh reality creates such an imbalance of power as to require adjustments to the competitive market model. To the extent collective bargaining results in wages that are different from the market wages the system is working as intended. Thus, in this regard too, permitting debtors-in-possession to repudiate a collective bargaining agreement to bring the wages of organized employees down to the lowest common denominator is contrary to the very essence of labor policy. In contrast, a commercial contract that diverges from the market is simply the manifestation of an improvident bargain and a provision of law that in limited circumstances permits an acceleration of the process of ending that divergence offends no social policy.

Fourth, while we have assumed to this point that the Bildisco rule pushes collective bargaining agreements down to the level of commercial contracts covering goods and services the debtor continues to need, that assumption understates the overall harm done by that decision. It is unlikely that the debtor's basic commercial contracts — for utilities, fuel, paper, ink, etc. — will be far from the market and that there will be a profit to the debtor in their repudiation. Thus, under Bildisco a bankruptcy rule of relatively small moment with regard to the equivalent commercial situation is used to work a substantial inroad into collective bargaining.

Finally, the Bankruptcy Code provision preserving Railway Labor Act collective bargaining agreements shows that the Bildisco rule is not necessary to successful reorganization.

Turning now to our disagreement with H.R. 5174, it is our position that Congress should follow its usual practice and make the Bankruptcy Code amendments effective upon enactment.

It is the long-settled general rule in the American legal system that a law, when enacted, becomes applicable to everyone, wherever and however they may be situated, without favor or exception. This general rule was first announced by Chief Justice John Marshall 183 years ago, in United States v. Schooner Peggy, 1 Cranch 103, and has been reaffirmed repeatedly, most notably in Bradley v. School Board of Richmond, 416 U.S. 696.

Those who allege that we seek some unfair "retroactive" law are either ingenous or ignorant of the traditional view. Those who argue that Congress should depart from its tradition, and should carve out a special immunity group they wish to immunize from the law, have the heavy burden of justifying the creation of this privileged class of free-riders. We do not believe this burden has been, or can be, met.

The courts have established general rules for preventing "manifest injustice" in the application of new legislation to pending matters. But no one involved in a current Chapter 11 proceeding can argue that it would be manifestly unjust to apply a law passed by Congress reconciling the public policies underlying our labor laws and bankruptcy laws and that such a law should not apply to his particular case.

Nor is there any "right that had matured or become unconditional" in pending Chapter 11 proceedings, which would be unfairly affected by the proposed legislation. The proposed legislation is essentially procedural; it neither creates nor extinguishes substantive "rights"; it sets forth a procedural framework for determining whether a trustee or debtor-in-possession may reject a contract.

Finally, and in some respects most importantly, in view of the split in the courts of appeals prior to the Supreme Court's Bildisco decision regarding the issues addressed in the proposed legislation, it can hardly be argued that anyone justifiably could have "relied" upon any single "reading" of the law. Any trustee or debtor that took any action "betting" on the outcome of the Supreme Court decision and the legislative process may have been daring, but can't be heard to complain if he bet unwisely.

The CHAIRMAN. Thank you, Mr. Gold.

Let me just state again for the record that a number of our committee members are attending the memorial service for our former colleague, Senator Frank Church, and, therefore, are unable to be with us this morning. Senator Kennedy, in particular, is attending the service for Senator Church and has asked that his statement be included in the record, which we will do without objection. That is true of both committees, both the Labor and Human Resources Committee and the Judiciary Committee.

[The prepared statement of Senator Kennedy follows:]

from the office of
Senator Edward M. Kennedy
of Massachusetts

STATEMENT OF SENATOR EDWARD M. KENNEDY
at a Joint Hearing before the
COMMITTEE ON LABOR AND HUMAN RESOURCES and
COMMITTEE ON THE JUDICIARY

on the REJECTION OF COLLECTIVE BARGAINING AGREEMENTS
IN BANKRUPTCY REORGANIZATIONS

For Immediate Release
April 10, 1984

In February the Supreme Court in NLRB vs. Bildisco and Bildisco, said that a company in reorganization may unilaterally change wages and working conditions of its employees as soon as it files a chapter 11 petition and ruled that the bankruptcy court must approve rejection of the contract if it finds that the contract is "burdensome" to the company. In so doing, the court opened the door to a new and harsh era of labor management relations which Congress must now act to close.

Perhaps the most disturbing aspect of the Bildisco opinion is the court's suggestion that Congress spoke in favor of the result there when we enacted the Bankruptcy Code in 1978. As Chairman of the Judiciary Committee during the debate on that legislation, I am certain that we neither intended, nor did we approve, such a clear invitation to violate the contractual rights of American workers.

The 1978 Bankruptcy Code amendments were designed, in part, to make it easier for corporations with substantial debts to reorganize. They were never intended to be a tool for union busting. The leading case at that time permitted a court to reject a labor contract only where there was a clear showing that a company's reorganization effort would otherwise fail. That rule was a sound and reasonable one which maintained the proper balance between the bankruptcy laws and national labor policy.

Following the Bildisco decision, I introduced S. 2462, the Bankruptcy Reform and Collective Bargaining Act of 1984, a bill which would, in essence, reestablish the standard for rejection of a collective agreement set out in the REA Express case. The House of Representatives has already approved a provision which is virtually identical to my proposal.

Congress is now very close to agreement on an overall bankruptcy reform package. Resolution of the Bildisco issue remains the key stumbling block. But even here there appears to be a developing consensus on the essential elements for reform. For my part, I am prepared to join with members of both parties in reaching a prompt and equitable resolution of this matter.

The **Chairman**. I turn to you, Senator Specter.

Senator **Specter**. Mr. Gold, I would like to pursue with you the question that I have raised with Mr. Presser, and that is your reaction to vesting broader discretion in the bankruptcy judge to mold a contract and to retain jurisdiction for reapplication at a later time to reinstate provisions of the contract which be felt necessary to abrogate initially in the interest of preserving the ability of the debtor to continue to operate.

Mr. **Gold**. Senator Specter, we have considered and have no objection to the concept of interim modification of collective-bargaining agreements as a means of dealing with the problems faced by a distressed employer who is forced into bankruptcy. We are totally against, however, any increase in the discretion granted to bankruptcy judges. Our experience is that bankruptcy judges have too much discretion and too few legal limits on what they may do. We fear also that to give a bankruptcy judge the power that Congress has very wisely refused to give to either the National Labor Relations Board or to Federal judges—namely, the power to negotiate collective-bargaining agreements—would cause more problems ratter than a solution.

In other words, our view is that interim short-term modifications worked out by the parties, under a compulsion of law, where there are serious losses to one side or the other if they do not work out such a modification, is a hopeful and appropriate way of solving the problem, but we could not agree that it would be sound to have the bankruptcy judge be the one to state what is and is not in the agreement.

Senator **Specter**. If the parties worked out the matter by negotiations, they have an ovation of the contract. They can agree to a new contract; that has no power at all to bankruptcy. Would you oppose having a bankruptcy judge decide, if the entire collective-bargaining agreement cannot stand and have the debtor survive, that certain aspects of it remain in effect, such as the grievance procedures and seniority but make a modification only as to wages?

Mr. **Gold**. The presumption of the question, as I understand it, is that the bankruptcy judge has determined, under some standard, that the agreement should be repudiated. Obviously, I would be hard put to say that a law providing that if a standard is met, the result is that the wage and fringe benefit provisions are no longer binding but that certain other protections as a matter of law are maintained would not be preferable to losing the whole agreement.

My point to you, though, is that the standard for determining whether or not there can be repudiation of either the whole agreement or the wage and fringe package will be a large determinant of whether or not the parties reach their own agreement. We prefer action forcing standards which will result in negotiated settlements to standards which invite litigation.

Mr. **Simon**. If I may add to that, there are few instances in which I would agree with anything in the Supreme Court's *Bildisco* decision. But one respect in which I think the Court was right on the money is in pointing out that concerning the bankruptcy court with matters affecting labor negotiations "will simply divert the bankruptcy court from its customary area of expertise into a field in which it presumably has little or none." I would say to the committee that as one who has labored in that vineyard, to the extent that the Court talks about "little or none" in the way of expertise of the bankruptcy court with regard to traditional labor law and labor negotiation or labor contract matters, I would emphasis the word "none" rather than the word "little."

Senator SPECTER. Mr. Simon, I am not missing my point. I am not suggesting that the bankruptcy judge become involved in labor negotiations or an arbitration. I am suggesting that the bankruptcy judge have more power than to say simply that the contract is abrogated or the contract remains in force. I am suggesting that he would have the authority not to get the parties together and negotiate or arbitrate but to say, "There are seven parts to the contract. Five of them can remain in force. Two of them cannot, under the standard of law to be applied."

Mr. SIMON. The reality of the administration of chapter 11, however, especially if that were made a matter of law, is that the bankruptcy judge does insert himself into virtually every aspect of the administration by the debtor in possession. If there were negotiations, which presumably come before the possibility of such a ruling, the bankruptcy judge would inevitably become part of that process, as in those few instances where Congress has sought to impose in effect mandatory arbitration or compulsory interest arbitration, such as where there are large railroad strikes or in the U.S. Postal Service.

The necessary implication and the necessary practical and pragmatic reality is that the ultimate decider becomes very much involved in the bargaining process. That is inevitable. That is the nature of the chapter 11 bankruptcy judge role.

Senator SPECTER. You are not suggesting that whether the standard is *Bildisco* or *REA* that bankruptcy judges stay out of the negotiations between the parties at the present time, are you?

Mr. SIMON. No, I am not. What I am suggesting, however, is that to cloak the bankruptcy judge with the ultimate power to write the terms of the labor contract is to cloak him with the power that Congress has chosen not to grant with regard to its expert agencies—the National Labor Relations Board, the National Mediation Board, and the Federal Mediation and Conciliation Service. All of those agencies are respected by Congress for the enormous expertise they have in this area. Except on extremely rare occasions, Congress has not seen fit to grant this awesome power to supplant the practice of collective-bargaining and to give that awesome power to a single individual, even where he has expertise. I cannot imagine that management would feel terribly comfortable with a bankruptcy judge having that power. I can fairly safely assert that labor would not. I cannot even imagine, when it came down to it, that the bankruptcy judges would welcome that kind of a power because they would be operating in a milieu in which they have absolutely no background, no experience, no expertise, no practical feel. I think that would be a disaster, not merely for the parties in that case but for the process itself.

The CHAIRMAN. Could I make one final point, Senator. Under the Taft-Hartley Act, the President, if he notices a national emergency, can call for an injunction against striking.

Mr. **Simon**. He can, and what he does is appoint a Presidential emergency board. If you look at the dozens of Presidential emergency boards that have been appointed to deal with those problems, you will find that they are, without exception, drawn from the labor-management relations community. Generally speaking, they are the very best, the most experienced labor arbitrators, academics, or community leaders in one regard or another. There is no instance, of which I am aware, that this awesome power has been given to someone with no background or experience.

Mr. **Gold**. But beyond that, they cannot mandate a settlement.

The **Chairman**. They can force the employees back to work, under terms different from the collective bargaining agreement.

Mr. Gold. For a limited period of time. The theory of labor law has been, from 1935 and 1947 on, not to give anyone the authority to mandate a settlement. Senator Taft was quite insistent on that.

The **Chairman**. Mr. Simon's point is well taken.

Senator **Specter**. I understand Mr. Simon's point. He has made it forcibly, but I do not think he is necessarily correct. It is a very different posture when parties are sitting down to negotiate freely before there is an insolvency factor. Nobody is suggesting that they should be compelled to come to a settlement or that there should be an arbitration or an adjudication in that context. But where you have agreement, where the bankruptcy judge has under existing law the option of saying that it either remains in effect or it is all abrogated, and it has multiparts, there is some substantial logic, as I see it, to treat it as severable, to leave some in effect and some not in effect. That is a judgment the committee has to make.

The final question I have for you is this. We are really doing a lot of analysis and a lot of arguing on the two standards, on the *REA* standard and on the *Bildisco* standard. The *REA* standard is the requirement to show that repudiation was necessary to permit the reorganization to proceed, and the *Bildisco* standard is whether the collective bargaining is burdensome to the estate, and the balance of equities favors repudiation.

My question is, can you provide examples where the decisions are different, depending upon which of these two standards is applied? How much real difference is there in practical application?

Mr. **Simon**. We had one recent decision just a month or two before the *Bildisco* Supreme Court decision in another major bankruptcy, *Saxon Paper,* one of the Nation's large paper companies, which involved the United Paperworkers Union. There, the bankruptcy court found, as I think it inevitably had to, that the company had not met the *REA Express* standard by establishing that but for rejection of the labor contract the company could not survive in reorganization. I would rather expect, however, that had the *Bildisco* standard been applicable to that case, we would have had a different situation.

In the pending Continental matter, Continental has asserted in court that it could meet any standard: It could meet the *REA Express* standard, it could meet *Bildisco,* it could meet any conceivable standard. I would suppose, to the extent that Continental they would argue that before the *Bildisco* Supreme Court decision, they would argue it today, and they would argue it, presumably, with regard to whatever standard emerged from the Senate process. But there is a very real difference between the in effect wink-and-a-nod to the bankruptcy court that the *Bildisco* Supreme Court decision constitutes and a hard-and-fast look at the reality of the reorganization process that *REA Express* mandates.

There are few cases in which the application of the *Bildisco* standard by the vast majority of the bankruptcy courts in this Nation would not result in bankruptcy court rejection of a collective bargaining agreement. I hasten to add that even when the *REA Express* standard was the standard articulated by the bankruptcy courts throughout this country before the *Bildisco* Third Circuit opinion in 1982—and we are talking about 7 years between *REA Express* and the *Bildisco* Third Circuit opinion when almost all the courts said they were applying the *REA Express* standard—the vast majority of decisions rejected collective bargaining agreements. To be sure, some reversals were obtained, usually at the district court level, but I want to emphasize that I never considered even the *REA Express* standard one which adequately took into account fundamental policies of national labor law.

I shared a panel about 6 months ago with a noted management lawyer. He said that his last count of decisions under the *REA Express* standard demonstrated that 19 of 22 decisions at the bankruptcy court level had resulted in rejection. So I am not one to say that the *REA Express* standard itself is the panacea, from the point of view of maintenance of our national labor policy. I would argue, as Larry argued, as the Supreme Court AFL–CIO grief argued, that labor contracts in effect are not executory contracts, as are the normal contracts dealt with under section 365 of the code, and should be treated very differently, and that even the *REA Express* standard was not the appropriate standard to apply.

Mr. **Funk**. Senator Specter, I might comment on a particular case that I think is helpful in considering your question as to whether or not there is really a difference between those two standards. In the *Wilson Foods* case that I was involved in, Wilson filed chapter 11 and specifically stated that their primary purpose was to reject the union contract. There was never any real threat that Wilson Foods was going to collapse or not survive a chapter 11. Wilson Foods filed and rejected the collective bargaining agreements and did not go through court proceeding to reject it; they unilaterally made changes.

Wilson Foods promised their creditors from day one that they would get 100 cents on the dollar, and in fact that is what happened. There was a settlement reached because of the *Bildisco* case. The union was terribly concerned that under *Bildisco,* the company would successfully reject the contract. Now, had it been the *REA Express* standard, had that court applied the *REA Express* standard, we feel that there is no way the company could have established that a reorganization would not succeed.

Senator **Specter**. Thank you, Mr. Chairman.

The **Chairman**. Senator Nickles.

Senator **Nickles**. Thank you, Mr. Chairman. I am somewhat familiar with the *Wilson* case, and I think it might complement the record if we could ask for a response to Mr. Funk's statement, just to make sure we have both sides of that argument.

Mr. Gold, suppose Congress does enact a bankruptcy package without the *Bildisco* provision, either the House side or the language Senator Hatch has worked on. What do you think the real impact would be on the failure to overturn *Bildisco*?

Mr. GOLD. Senator, I am not a prophet. We expect the worst, and we hope for the best.

Senator NICKLES. Do you have any knowledge of employers lining up to file chapter 11 petitions to reject their labor agreements right now?

Mr. GOLD. Prior to the 1978 amendments and, most particularly, prior to the more adventurous use of bankruptcy, which started in 1980, we know that this was a small problem indeed. We have seen it grow, and the lines of development are very troubling to us. The answer to your question is, there has been a substantial increase in the number of employers who are going into bankruptcy and repudiating agreements and of employers who are threatening to go into bankruptcy in order to get modifications of their agreements. This is part of a process whereby employers, at a time that is convenient to them, accelerate the process of renegotiating agreements, a privilege unions do not have.

If someone wants to amend the National Labor Relations Act to say that when times are good, unions may reopen contracts as they see fit, maybe we would reconsider the whole matter. But what we find is a one-way process and a process which undermines the basic system mandated by the National Labor Relations Act. At the very least, we would like to see the toughest rational standard consistent with assuring that truly troubled companies can survive the reorganization process to serve as a limit on the developments I have outlined.

Senator NICKLES. Do you think there have been many filings for chapter 11 after *Bildisco* who have been expressly for the purpose of abrogating their union contracts?

Mr. GOLD. There are 60,000 local unions affiliated with the national unions that constitute the AFL-CIO, and they have hundreds of thousands of collective agreements. I just could not give you an authoritative answer. The trend continues up. That much we know from what we are told by our affiliates. This morning, before we came up here, as a tribute to the American entrepreneurial system, someone gave us a flyer for a seminar on how to use chapter 11 under the *Bildisco* decision to get out from under "onerous labor agreements." A few seminars of that kind, and I am sure that the answer to your question will be provided.

Senator NICKLES. Let me ask you a different question. You are in total agreement, with the exception of the effective date, with the House-passed language?

Mr. GOLD. Yes.

Senator NICKLES. Are you in agreement with the so-called Hatch amendment?

Mr. GOLD. No. AFL-CIO President Lane Kirkland, wrote Senator Hatch a letter saying that we cannot support that amendment in its present form.

Senator NICKLES. What did you find objectionable in the language he is working on?

The CHAIRMAN. Why don't we put that letter in the record at this point, so everybody can see it.

Mr. GOLD. Thank you, Senator.

[Letter from Mr. Kirkland follows:]

American Federation of Labor and Congress of Industrial Organizations

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March 30, 1984

The Honorable Orrin G. Hatch
135 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

This is to advise you that the AFL-CIO cannot support the Senate bankruptcy bill's proposal governing the rejection of collective bargaining agreements during Chapter 11 reorganizations, but that given the number of differences between the House and the Senate, in the interest of expedition, the Federation will do nothing to block prompt Senate floor action by unanimous consent.

We do agree with the effective date provision and have no objections to the paragraphs substituting an expedited procedure to consider rejection applications for the present rule permitting employers' unilateral action.

However, with regard to the heart of the matter — the substantive standard for determining whether rejection is to be allowed — we have concluded that the proposal, because of its complexity, lack of clarity and heavy use of qualifying phrases, will be construed to do nothing more than continue current law. Because the present rules provide no protections of any worth for collective bargaining agreements we cannot agree to legislation that perpetuates the status quo.

Sincerely yours,

Lane Kirkland
President

c: Senate Judiciary Committee

Mr. **Gold**. The problem as we see it is a problem equivalent to the problem created by the *Bildisco* decision. The entire process of a chapter 11 reorganization is to accommodate the stated needs and desires of the debtor in possession. Wherever there are doubts, those doubts are resolved in his favor. The standard in Senator Hatch's draft, which we think is a statesman-like effort, is very vague and general, like the language of the Supreme Court decision in *Bildisco*. It is our best judgment, and we do not believe that many management people would disagree, that it is a standard which in practice would mean that collective bargaining agreements could be freely repudiated. That is not a result we think ought to occur, and it is because of the fact that the language is so indeterminate and so open to discretionary application by bankruptcy judges that we were forced to say that we could not, in good conscience, support it.

Senator **Nickles**. Prior to *Bildisco*, we had the *REA Express* standard. You are totally opposed to the *Bildisco* standard, where "if debtor can show the collective bargaining agreement burdens the estate after careful scrutiny, the equities balance in favor of rejecting the labor contract." Did the House-passed language repeal the *REA* or just go back to it?

Mr. **Gold**. We read the House bill as its sponsors state to accept and embody the *REA* standard.

Senator **Nickles**. It is your belief that if we adopted the House language, we would be overturning the 9 to 0 Supreme Court decision and would be returning to the *REA Express* standard?

Mr. **Gold**. That is right.

Senator **Nickles**. Thank you very much.

The **Chairman**. Mr. Gold, a prominent academician, Mr. Vern Countryman, who has written and spoken extensively on the problem of rejection of labor contracts, in an article published last year made the following observation:

> It would appear that considerable weight should be given to a considered union view that rejection is not necessary. This conclusion would not follow, however, if it appeared that the union was willing, for tactical reasons, to sacrifice its particular employees involved and thus did not care whether the debtor in fact was forced into liquidation.

Mr. Countryman also observed, a union which is only seeking to forestall a liquidation by several months in order to preserve short-term employment is "not acting in the best interest of the employees." In that case, Mr. Countryman does recommend rejection. Would you agree with that recommendation in that case?

Mr. **Gold**. The approach that Professor Countryman suggests is an approach which seems to us to be a rational and sound alternative to the House-passed bill. Our No. 1 priority is to have Congress create a system which would facilitate good-faith collective bargaining, with the end in view that repudiation hearings would never take place or take place only where one side or the other was not fulfilling its role. It seems to us that Professor Countryman's suggestion is well suited to meeting that end, and it is certainly an approach on which we have the most open of minds.

Mr. **Simon**. If I could just supplement something else that Professor Countryman said when he was, in effect, addressing the desirability of the appropriateness of rejecting collective bargaining agreements matched against whether or not the reorganization was going to fail, and the balancing of interests involved. He said,

> If the bankruptcy court does not know that the reorganization will fail unless rejection of the collective bargaining agreement in question is permitted, on what basis may it override the significant Federal labor policies discussed? Permitting a bankruptcy court to reject a collective bargaining agreement because it cannot tell whether or not the reorganization is going to succeed effectively performs the delicate balancing of conflicting statutory objectives by placing a cinder block on the Bankruptcy Code side of the scale.

The **Chairman**. That is interesting. Mr. Gold, do you know whether or not any unions, either affiliated unions with you or other unions you know about, have ever resisted contract rejection for tactical reasons?

Mr. **Gold**. I have no doubt, Senator Hatch, that as close as we are, we have not achieved perfection. We do enter into the process of considering this question with the understanding that a law that makes it in the best interest of both sides to avoid a hearing before the bankruptcy court by resolving their differences is sound national policy.

The **Chairman**. What I am getting to is, where the national or international union makes decisions or policies that enhance the prospects of liquidation of the company, even though it means the loss of jobs to the local bargaining unit. For instance, as a matter of custom and practice, how much control do the members of the local bargaining unit have over their own destiny under current law? Could a union's international officers, as a means of preserving industrywide benefits, simply prevent the local union from voting to acquiesce in a contract negotiation or, in this case, a contract rejection?

Mr. **Gold**. Senator Hatch, what I was trying to say before was, it is our understanding that under Professor Countryman's approach, if the situation you just outlined were to occur, repudiation would be allowed. Since I said that we regard Professor Countryman's approach as one which is worthy of serious consideration, one we would consider, we have to accept that consequence, and we do accept it.

The **Chairman**. Would you agree that it might be fair to consider some sort of proposal in this unique situation which would put the matter of contract rejection more directly into the hands of the local unit, which is more dramatically and adversely affected after liquidation?

Mr. **Gold**. I would have to see what that proposal says.

The **Chairman**. But you are not opposed to it, if the language could be worked out?

Mr. **Gold**. I am neither for it nor against it. I am perfectly prepared to say, because we have discussed this matter, that an approach which makes repudiation possible if the union does not meet its responsibilities, as outlined by Professor Countryman, is one that we would consider. Whether we would consider tampering with the collective-bargaining structure is a different question and one I cannot answer. We are willing to take our just deserts where we do not do our job, but whether we ought to change well-settled practices is a different question.

The CHAIRMAN. I will ask the same question I asked of the Teamsters' representatives. Would you be willing to meet with myself and my staff and other interested Senators in order to fashion a bill that would protect workingmen, without tilting the bankruptcy process against other creditors, some of whom are working men and women?

Mr. GOLD. The answer to that is, as my wife and children are willing to attest, we have been working along those lines for some time and would be pleased and honored to be able to continue to do so.

The CHAIRMAN. We are appreciative that you have taken the time to be here, and that all three of you have expressed the viewpoints of the AFL–CIO.

Senator SPECTER. Mr. Chairman, I have one more question. Let me approach the suggestion I had from a slightly different point of view. Would there be any difference in your response, Mr. Simon, if the opportunities for the debtor were limited so that his petition for relief under the existing agreements would be to those portions of the contract on which he needed relief to stay in business or whatever the standard might be?

Mr. SIMON. I think that is something we certainly want to have a look at. I do think that it comes close to raising many of the same problems I addressed earlier, which is the injection of the bankruptcy court willy-nilly into the process. But I think it certainly approaches the matter somewhat differently and deserves a closer look.

Senator SPECTER. Well, that certainly is a different response than before. Maybe we can pursue it from that perspective.

Mr. GOLD. I would like to add, Senator, that it seems to us that there is a difference between spelling out more limited consequences of the failure of the parties to reach a negotiated settlement than total repudiation, and to spell that out in legislation, which we would want to seriously consider, and giving the bankruptcy judge a wide discretion. Our experience to this point, as Mr. Simon has stated, is that the bankruptcy judges do not have the background or the expertise to exercise such a discretion.

Senator SPECTER. But regardless of the end from which you approach it, he is going to have the same judgment to make, and he is going to have very much the same kind of discretion, will he not?

Mr. GOLD. No, it does not seem so to me. If the bankruptcy judge has a stated obligation to perform, namely to determine under a known legal standard whether the parties have met their bargaining obligation, and he knows that the consequence of his conclusion that they have not is that only certain necessary changes are made in the agreement rather than that the entire agreement is repudiated, that is a very different situation than if he has to make the same legal judgment but also can make his own determination, rather than Congress making the determination, of what kind of an agreement the parties should have. It just seems to us to be very different.

Senator SPECTER. Thank you.

The CHAIRMAN. Let me just ask a question. As I understand your position and the House bill, you would like the labor union and the failing business to negotiate in advance of any application to reject the contract over what contributions other creditors should make to help rehabilitate the business. My question would be, how would it be possible at that early stage to decide what contributions other creditors can make before all creditors are even known? To put it another way, is it feasible to require a total reorganization plan to be negotiated by the union and the management before a creditor's committee is formed or the bankruptcy court has even decided to begin consideration of the case?

Mr. GOLD. Our position on that question, Senator Hatch, from the interval discussions we have had, is that there are two very difficult choices forced on all parties to these discussions by the dynamics of the reorganization procedure. The question of whether the collective-bargaining agreement is to be repudiated comes at the front end or the beginning of the proceeding, as you have just stated. The question of what other creditors will do toward the overall reorganization process is not settled until much later.

If you disregard the fact that the union and the employees it represents are not the sole source for contributions to a successful reorganization, and that reorganization is really for the purpose of rearranging both the capital and the debt structure of the debtor, you end up with the union called on to carry much more than its share in any fair weighing of what its share ought to be. You end up with the Wilson situation, where the union and the organized employees are the sole source of the debtor's new capital. On the other hand, there are difficulties in determining what the just or proper shares of the other factors in the reorganization are going to be. But that question is not without any illumination. We are not in year one of the law and practice of reorganization.

There is information available, and there are past cases and past practices known. We have never suggested more than that repudiation of collective agreements should not be forced on the basis that the union must bear the entire load. Rather, we have argued that this is a comparative process and that the sacrifices of the other factors—the secured creditors, the trade creditors, the management itself, other employees, the other executory contract holders—have to be taken into account in determining what is just and proper to demand of the union.

The CHAIRMAN. Thank you. We appreciate having you three with us today.

Senator THURMOND. Just a minute. I have a few questions.

The CHAIRMAN. Oh, I am sorry, Mr. Chairman. I thought you had already asked.

Senator THURMOND. No, I had not asked any of this particular group.

Mr. Gold, you and I are familiar with the need to encourage good-faith bargaining prior to the rejection of a collective-bargaining agreement. The *Bildisco* decision, of course, encourages that very policy, as is clear from the following portion of that opinion. You are familiar with this passage, I guess:

> Before acting on a petition to modify or reject a collective bargaining agreement, however, the bankruptcy court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less. . . . The bankruptcy

court need step into this process only if the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization.

Aside from this language in the *Bildisco* decision itself, there remains the possibility of a strike against an employer, following rejection of a collective-bargaining agreement. Why are these incentives insufficient to ensure good-faith actions in bargaining on the part of an employer?

Mr. GOLD. There are two basic reasons, Senator Thurmond, that these incentives, in our judgment, are inadequate. First, under the *Bildisco* decision, the employer gets to act first. He changes the wages, hours, terms and conditions of employment, and at that point the collective-bargaining process that the Court describes is supposed to begin. Obviously, that is a highly advantageous position for the employers and a highly disadvantageous position for the union and the employees. If that were not true, either side at any time could always tear up a collective bargaining agreement, saying "We are ready to bargain all over again," and that is precisely the opportunity that the National Labor Relations Act denies employees.

Second, the negotiations take place at a time picked by the employer, which is the very worst time from the union's perspective and the perspective of the employees. Both the union and the employees have no way of knowing at that point the extent of the employer's difficulties. They are in shock from having to deal with a completely new situation, and the entire process is loaded against the union and employee interest. We are, as we have made plain, for a process which more evenly balances the scales by giving both sides an incentive to reach an agreement by making it plain to the employer that if he asks too much, he may not get the repudiation of the collective-bargaining agreement that is in force, and to make it plain to the union and the employees that they have to seriously consider good-faith proposals by the employer for needed changes or risk that repudiation.

In other words, the current legal rule takes the union out of a situation where it has a guaranteed agreement and puts all the power or a great deal of the power in the employer's hands. We are asking for something that is a little closer to a middle ground.

Senator THURMOND. In other words, what the Supreme Court said in its decision about bargaining incentives you feel is insufficient?

Mr. GOLD. Yes, that is our primary point. There is no doubt that there is a collective-bargaining component, and always has been, to the legal requirements for securing repudiation. But it is not collective bargaining in which there is going to be much give and take. There is as much equality of power as I would have in hand-wrestling any member of the Washington Redskins' offensive line.

Mr. SIMON. Let alone President Reagan.

Mr. GOLD. It is a situation which gives us little or nothing other than a promise.

Senator THURMOND. Another question. Subtitle IIC of H.R. 5174 contains a provision requiring the release of certain financial information to the authorized representative of the debtor's employees. What information would be required to be released under this provision which is not available to unions under existing rules of discovery?

Mr. Gold. That requirement is put in to assure that there is a timely release of information by assuring that the employer cannot wait until the hearing. The information is the information to back up the claim that total repudiation or the proposed modifications truly are necessary to the employer. Beyond that, it would be difficult for me to specify, nor do I have an opinion on what bankruptcy judges would otherwise require.

Senator Thurmond. Does it require the release of any information that is not already available under existing law?

Mr. Simon. Senator Thurmond, the practice has been, in cases such as *Continental, Braniff, Saxon* and others, that there is enormous resistance at the discovery level to whether or not some of the information being requested by the union, at least when the *REA Express* standard applied, is relevant to the inquiry. Since there is considerable lack of certainty in that area of the law as applicable to the *REA Express* standard, I think that this would set the bankruptcy court's mind at ease and give it some direction and guidance into the nature of the information appropriate to that inquiry.

Senator Thurmond. Do you believe that claims from a breach of collective-bargaining agreements should be given an administrative expense priority as required by the House bill?

Mr. Gold. I did not think the House bill did that, Senator. I apologize.

Mr. Simon. I believe that was in an earlier version of the House bill. I do not understand the House bill as presently drafted to lead to that result, unfortunately. I think it is a result that I would favor.

Senator Thurmond. So you agree then that the House bill does not contain it?

Mr. Simon. I do not believe so.

Mr. Funk. I do not believe so, either.

Senator Thurmond. Prior to the Supreme Court decision in *Bildisco*, did you discern any difference in the number of reorganizations involving labor agreements filed in circuits utilizing a balancing-of-the-equities standard and those using an *REA Express* standard?

Mr. Gold. In terms of that question, until——

Senator Thurmond. Now, all of you do not have to answer. Time is moving on.

Mr. Gold. In terms of that question, the second circuit standard was announced in 1975. There was no other court of appeals decision until 1982. That was the *Bildisco* case, and thereafter, the Eleventh Circuit stated a test in 1983. So there was no way to make such a comparison. The *REA Express* standard was the only stated court of appeals standard until 1982.

Senator Thurmond. The last question I have is this. If Congress were to adopt a labor provision which eliminated the power of the debtor to unilaterally reject a collective bargaining agreement, substituting an expedited hearing process and decision, what do you believe to be the appropriate time limits for such an expedited hearing and decision?

Mr. GOLD. The House bill sets limits in terms of the course of events from the bankruptcy filing until the application for rejection, which in turn can lead to a determination in 30 days and put the timing beyond that in the hands of the bankruptcy judge. We have stated we support the House bill, and we are prepared to live with that very expeditious schedule as part of our agreement to that language.

Senator THURMOND. In closing, I would urge you, as I stated to the other gentlemen, to try to get together with Senator Hatch to see if you can reach a reasonable agreement. This committee has no bias toward either side. We want to see justice done, but you must all be reasonable. Both sides must be reasonable if anything is to be accomplished. Otherwise, we will have to proceed in another way.

Mr. GOLD. Thank you, Senator. We appreciate both the forebearance every member of this committee has shown and that opportunity. Thank you.

The CHAIRMAN. Thank you, Mr. Gold, for being here.

Out next witnesses will be on a panel representing various business associations: Mr. Robert T. Thompson, from Thompson, Mann & Hutson, here in Washington, DC, who is chairman of the Executive Committee and chairman of the Labor Relations Committee of the U.S. Chamber of Commerce. He will be accompanied by Mr. Mark A. de Bernardo, a labor law attorney in Washington, DC.

Representing the National Association of Manufacturers will be Mr. John S. Irving, Kirkland & Ellis, here in Washington, DC, who is chairman of the NAM Labor Law Advisory Committee. Mr. F.M. Lunnie, Jr., assistant vice president, industrial relations, also will accompany Mr. Irving.

Representing the Small Business Legislative Council is Mr. Herbert Liebenson, who is the executive director, here in Washington, and Mr. Eugene Granoff, from Vedder, Price, Kaufman, Kammholz & Day, also of Washington, DC.

We are happy to welcome all of you to the committee, and we look forward to taking your testimony. It is 12 o'clock, and I am prepared to take your testimony. If you would prefer me to recess and come back at 2 o'clock, I would be happy to do that, but I think it would be better to take your testimony right now, unless you feel otherwise. I want to accommodate you.

Mr. THOMPSON. I would rather proceed, myself.

The CHAIRMAN. Mr. Thompson, we will turn to you and welcome you to the committee.

STATEMENT OF ROBERT T. THOMPSON, THOMPSON, MANN & HUTSON, GREENVILLE, SC, ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, ACCOMPANIED BY MARK A. DE BERNARDO, LABOR LAW ATTORNEY, WASHINGTON, DC

Mr. THOMPSON. Thank you, Senator Hatch. My name is Robert T. Thompson, senior partner in the law firm of Thompson, Mann & Hutson of Greenville, SC, and Washington, DC. I was formerly the chairman of the board of directors of the Chamber of Commerce of the United States. I am currently the chairman of the Chamber's Executive Committee and the Chamber's Labor Relations Committee. With me today is Mark A. de Bernardo, labor law attorney for the U.S. chamber.

The U.S. chamber welcomes this opportunity to appear before this joint hearing of the Senate Judiciary Committee and Senate Labor and Human Resources Committee and express our opposition to the labor provisions of H.R. 5174 or any other labor amendments to the Bankruptcy Code which may be considered by Congress which have a similar intent or effect.

The U.S. chamber's executive committee, which I chair, has considered H.R. 5174, the package of Bankruptcy Code amendments, and determined that defeat of the labor provision is the chamber's priority, despite our support for the consumer reform package and our concern about the continuation of the bankruptcy court system and the status of bankruptcy judges, all of which is addressed in H.R. 5174.

I will attempt to summarize my statement, and I would like to submit the full statement for the record.

The CHAIRMAN. Without objection, we will put the full statements in the record, and we do appreciate summarization Then we can have enough time for questions.

Mr. THOMPSON. I would like to repeat what I just said, though, because I think it is the essence of the message that I would like to deliver to this committee today. That is that our executive committee, which acts for the full U.S. Chamber of Commerce between meetings of the board of directors, and I am the chairman of it, has considered H.R. 5174, the package of Bankruptcy Code amendments and determined that defeat of the labor provision is the chamber's priority, despite our support for the consumer reform package and our concern about the continuation of the bankruptcy court system and the status of bankruptcy judges, all of which is addressed in H.R. 5174.

We are convinced that the labor provisions of H.R. 5174 or any similar Bankruptcy Code amendments threaten to create a major imbalance between our labor and bankruptcy laws, and a major imbalance in the relationship of the business community with organized labor.

Labor/bankruptcy is an issue now in focus because of the recent Supreme Court decision in *National Labor Relations Board* v. *Bildisco and Bildisco,* and the reaction of organized labor and the House leadership to legislatively reverse what they perceive to be an adverse decision.

The U.S. chamber completely supports the Court's *Bildisco* decision, in both its holdings and its rationale. More specifically, the chamber endorses and remains committed to both the balance-of-equities test for when an employee may abrogate a union contract under chapter 11 reorganization and the right of employers to unilaterally abrogate the union contract after filing in bankruptcy but prior to final affirmation of the reorganization plan by the bankruptcy court. These two holdings are the essence of the *Bildisco* decision, and the chamber opposes and urges Members of Congress to oppose any effort such as H.R. 5174 to reverse or alter these principles.

The net effect of enactment of the labor provisions of H.R. 5174, or similar provisions, would be: First, unionized employers would be effectively denied a legitimate chance at rehabilitation under chapter 11 reorganization, chapter 7 liquidation remaining the only alternative; second, unions would have significantly less incentive to make voluntary wage and benefit concessions to financially troubled employers prior to and during reorganization; third, unions' organizing campaigns would be put in an enhanced posture with the opportunity to exploit the issue by telling workers that if they unionize they will be insulated from the negative economic ramifications of reorganization, a very significant small business issue; fourth, many more businesses would fail, rather than be revived, with a significant aggregate harm to the national economy and the economies of local communities; and fifth, commensurate with these business failures, many jobs would be lost, unemployment particularly rising in those economically depressed areas of the country that can least afford it.

For these reasons and others discussed in our statement, the U.S. chamber respectfully urges the Senate to strike from the bankruptcy court's reauthorization the labor provisions of H.R. 5174; oppose any attempt to alter the *Bildisco* balance-of-equities test for when a union contract may be abrogated under chapter 11 reorganization; oppose any labor amendment to the Bankruptcy Code, thereby preserving the deliberate and appropriate current accommodation between our labor and bankruptcy laws; and last, oppose the entire Bankruptcy Code "package" if the labor provisions overturning *Bildisco* are not deleted.

The U.S. chamber supports the *Bildisco* decision and maintenance of the judicial status quo on labor/bankruptcy. Thank you.

[The prepared statement of Mr. Thompson follows:]

LET'S REBUILD, AMERICA

IN THE 80's

Statement of the Chamber of Commerce of the United States

ON: POSSIBLE LABOR AMENDMENTS TO THE BANKRUPTCY CODE

TO: SENATE JUDICIARY COMMITTEE AND
SENATE LABOR AND HUMAN RESOURCES COMMITTEE

BY: ROBERT T. THOMPSON

DATE: APRIL 10, 1984

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The Chamber of Commerce of the United States is the largest federation of business and professional organizations in the world, and is the principal spokesman for the American business community. It represents about 200,000 members -- business firms, state and local chambers of commerce, and trade and professional associations.

More than 85 percent of the Chamber's members are small firms with fewer than 100 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- numbers more than 14,000 members. Yet, no one group constitutes as much as 26 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 50 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services, and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

STATEMENT
on
POSSIBLE LABOR AMENDMENTS TO THE BANKRUPTCY CODE
before the
SENATE JUDICIARY COMMITTEE
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SENATE LABOR AND HUMAN RESOURCES COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Robert T. Thompson
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I. Statement of Interest

I am Robert T. Thompson, senior partner in the law firm of Thompson, Mann and Hutson of Greenville, South Carolina, Washington, D.C., and other cities. I was formerly the Chairman of the Board of the Chamber of Commerce of the United States (the "Chamber"). I am currently the Chairman of the Chamber's Executive Committee and the Chamber's Labor Relations Committee. With me today is Mark A. de Bernardo, Labor Law Attorney for the U.S. Chamber.

The U.S. Chamber welcomes the opportunity to appear before this joint hearing of the Senate Judiciary Committee and Senate Labor and Human Resources Committee and express our opposition to the labor provisions of H.R. 5174 1/ or any other labor amendments to the Bankruptcy Code which may be considered by Congress which have a similar intent or effect.

The Chamber's Executive Committee, which I chair, has considered H.R. 5174, the "package" of Bankruptcy Code amendments, and determined that defeat of the labor provision is the Chamber priority, despite our support for the consumer reform package and our concern about the continuation of the Bankruptcy Court system and the status of bankruptcy judges, all of which is addressed in H.R. 5174.

1/ H.R. 5174 is the Bankruptcy Amendments of 1984, a "package" of amendments to the Bankruptcy Code introduced by Rep. Peter W. Rodino, Jr. on March 19, 1984 and passed by voice vote in the House on March 21, 1984. The package includes, among other provisions, a Bankruptcy Court reauthorization (which addresses the status of Bankruptcy Court judges), consumer credit reform provisions, a grain storage facility bankruptcy provision, and a provision restricting the ability of employers to abrogate union contracts when reorganizing under Chapter 11 of the Bankruptcy Code. This last amendment is the provision we are most concerned with today.

The U.S. Chamber, which is composed of nearly 200,000 businesses, is keenly interested in improving labor-management relations and preserving the balance in our country's national labor policies. Similarly, the Chamber is acutely aware of the need to preserve the carefully constructed balance between our labor and bankruptcy laws.

We are convinced that the labor provisions of H.R. 5174 -- or any similar Bankrupcy Code amendments -- threaten to create a major imbalance between our labor and bankruptcy laws, and a major imbalance in the relationship of the business community with organized labor.

II. Summary of Position

Labor/bankruptcy is an issue now in focus because of the recent Supreme Court decision in National Labor Relations Board v. Bildisco and Bildisco, [2] and the reaction of organized labor and the House leadership to legislatively reverse what they perceive to be an adverse decision.

The U.S. Chamber completely supports the Court's Bildisco decision in both its holdings and its rationale. More specifically, the Chamber endorses and remains committed to both the "balance of equities" test for when an employer may abrogate a union contract under Chapter 11 reorganization, [3] and the right of employers to unilaterally abrogate the union contract after filing in bankruptcy but prior to final affirmation of the reorganization plan by the Bankruptcy Court. [4] These two holdings are the essence of the

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[2] _____ U.S. _____, 52 USLW 4269 (February 22, 1984).

[3] Ibid at p. 11 (slip opinion). The Supreme Court held that: "(T)he Bankruptcy Court should permit rejection of a collective bargaining agreement under § 365(a) of the Bankruptcy Code if the debtor can show that the collective bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."

[4] Ibid at p. 17 (slip opinion). The Supreme Court held that: "We conclude that from the filing of a petition in bankruptcy until formal acceptance, the collective bargaining agreement is not an enforceable contract within the meaning of NLRA § 8(d)."

Bildisco decision, and the Chamber opposes -- and urges Members of Congress to oppose -- any effort such as H.R. 5174 to reverse or alter these principles.

The net effect of enactment of the labor provisions of H.R. 5174, or similar provisions, would be:

- Unionized employers would be effectively denied a legitimate chance at rehabilitation under Chapter 11 reorganization (Chapter 7 liquidation remaining the only alternative);
- Unions would have significantly less incentive to make voluntary wage and benefit concessions to financially troubled employers prior to, and during, reorganization;
- Unions' organizing campaigns would be put in an enhanced posture with the opportunity to exploit the issue by telling workers that if they unionize they will be insulated from the negative economic ramifications of reorganization;
- Many more businesses would fail, rather than be revived, with a significant aggregate harm to the national economy, and the economies of local communities; and
- Commensurate with these business failures, many jobs would be lost -- unemployment particularly rising in those economically depressed areas of the country that can least afford it.

For these reasons, and others discussed in our statement, the U.S. Chamber respectfully urges the Senate to:

- Strike from the Bankruptcy Courts' reauthorization the labor provisions of H.R. 5174;
- Oppose any attempt to alter the Bildisco "balance of equities" test for when a union contract may be abrogated under Chapter 11 reorganization;
- Oppose any labor amendment to the Bankruptcy Code (thereby preserving the deliberate and appropriate current accommodation between our labor and bankruptcy laws); and
- Oppose the entire Bankruptcy Code "package" if the labor provisions overturning Bildisco are not deleted.

The U.S. Chamber supports the Bildisco decision and maintenance of the judicial status quo on labor/bankruptcy.

III. Summary and Background of the Issue

In 1980, Bildisco and Bildisco (the "company"), a financially troubled building supply company in Avenel, New Jersey, filed a voluntary petition in bankruptcy for reorganization under Chapter 11 of the Bankruptcy Code. [5/] The company also sought to abrogate its contract with the Teamsters union. [6/] The Federal Bankruptcy Court, the U.S. District Court, and a unanimous three-judge panel of the Third Circuit Court of Appeals [7/] all approved the contract abrogation.

The Third Circuit also rejected a petition for enforcement from the National Labor Relations Board (the "NLRB" or the "Board") against the company. The Board had found the company guilty of unfair labor practices under § 8(a)(5) and § 8(a)(1) of the National Labor Relations Act (the "NLRA") [8/] for failure to make pension, health, and welfare contributions and to remit dues (withheld from pay) to the union. The Third Circuit not only upheld the company's union contract abrogation, affirming the District Court, the Third Circuit also held that the company had not violated the NLRA.

On appeal to the U.S. Supreme Court, the company's position was upheld once again. On February 22, 1984 the Court held unanimously that (1) collective bargaining agreements are executory contracts covered by the Bankruptcy Code, and (2) union contracts can be abrogated upon a showing that the agreement "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." [9/] The Supreme

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[5/] 11 U.S.C. § 1101 et seq.

[6/] Local 408 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[7/] In re Bildisco, 682 F. 2d 72 (CA3 1982).

[8/] 29 U.S.C. § 158(a) and § 158(d).

[9/] Op Cit, see fn. 3.

Court also held 5-4 that financially troubled employers may cancel union contracts pending reorganization by bankruptcy courts.

Organized labor's reaction was as harmonious as a symphony of scorched cats, 10/ and labor's allies in Congress responded accordingly. In fact, House Judiciary Committee Chairman Peter Rodino, Jr. introduced H.R. 4908 -- a bill which fully embraces the union position by more than reversing Bildisco — on February 22, the very day the Supreme Court handed down its decision. 11/

The timing of the Bildisco decision was fortuitous for its opponents. The decision was announced while the AFL-CIO's Executive Council was having its midwinter meeting — prompting a swift and decisive response. Capitalizing on election year political sensitivities and the Constitutional crisis confronting Congress on the status of our Bankruptcy Court system, 12/ legislative wheels turned quickly.

10/ The Bildisco decision in particular, and the bankruptcy/collective bargaining issue in general, dominated the AFL-CIO's midwinter meetings in Bal Harbour, Florida. United Steel Workers Acting President Lynn Williams called for a legislative reversal to the "catastrophic trend in decisions by the Supreme Court." AFL-CIO President Lane Kirkland also promised to "pursue a legislative remedy." AFL-CIO counsel Larry Gold said that the decision "enhances the opportunity for union-busting techniques." Machinists President William Winpisinger called the decision "the most outrageous goddamned thing I ever heard. We didn't even get our friends on that one." Daily Labor Report, Bureau of National Affairs, No. 36, February 23, 1984, p. AA-3.

11/ H.R. 4908 would prohibit unilateral abrogation of union contracts and would adopt a highly stringent test for bankruptcy court approval. The test provided for in H.R. 4908 has the effect of the "last resort" test advocated by labor in the Bildisco litigation, although its language is somewhat different. The bill employs a "but for" test which permits a bankruptcy court to approve employer rejection of a union contract under the reorganization process only if "absent the rejection ... (1) the jobs covered by such agreement would be lost; and (2) any financial reorganization of the debtor would fail." The U.S. Chamber opposes H.R. 4908.

12/ The Bankruptcy Court system was set to expire on March 31, 1984 unless Congress, at the direction of the Supreme Court, clarified the status of bankruptcy judges.

Rep. Rodino's H.R. 4908 evolved into one component of H.R. 5174, an 85-page bill which went from introduction on March 19, 1984 to passage on March 21, 1984 without a hearing, a markup, a committee report, or the opportunity for amendments. In fact, there was no separate vote on the labor provisions, nor a recorded vote on H.R. 5174 -- the "package" of Bankruptcy Code amendments passing by voice vote.

The labor provisions of H.R. 5174, which comprise four of the bill's 85 pages, reach far beyond H.R. 4908, and therefore, far beyond reversing Bildisco. 13/

The House-passed bill was sent over to the Senate where opposition to the labor provisions, coupled with significant disagreement over the status and number of bankruptcy judges slowed the heretofore quicksilver process.

An already complex issue was complicated by the multiple interests at stake in the "package" and the fact that the House leadership had held hostage necessary Bankruptcy Court legislation and popular consumer credit reform amendments.

Nonetheless, the labor provisions became pivotal. "Compromise" language on the labor provisions was drafted in the Senate, informally considered, and formally rejected by parties on both sides of the issue. 14/ The eleventh hour impasse resulted in a 30-day extension of the Bankruptcy Courts on a status quo basis.

13/ The test employed in H.R. 5174 for when a union contract can be abrogated under Chapter 11 is not "balance of equities," but rather a two-prong test which first permits abrogation only if it will preserve jobs (in effect prohibiting layoffs) and secondly permits employers to abrogate only if absent the abrogation, the business will fail (a "last resort" test). H.R. 5174 also prohibited unilateral abrogation by the employer of the union contract, set into place three preconditions to the filing for abrogation, and provided for broad union access to "financial and other data."

14/ The Chamber strongly opposed the so-called "compromise" language because it would substantially reverse Bildisco and substantially enhance union organizing abilities. Preservation of the Bildisco standard continues to be the Chamber priority.

IV. The Bildisco Decision

The February 22 Supreme Court Bildisco decision reassured an avenue of relief for many financially troubled companies. Perhaps equally important, the Court established far-reaching precedents regarding the relative status of competing interests and competing laws.

(A) Rejection of the More Stringent REA Express Standard

The Supreme Court considered the split in the lower courts on which standard should be applied by the Bankruptcy Court to allow a financially troubled company to abrogate its union contract: the less stringent"balance of equities" test from the Third Circuit [15] and Eleventh Circuit; [16] and the more stringent "last resort" test applied by the Second Circuit in REA Express. [17] The REA Express standard, advocated by the Board and the unions in the Bildisco litigation, is that employers should not be permitted to reject the union contract unless it can be demonstrated that its reorganization otherwise would fail.

The Supreme Court held 9-0 that:

> "The standard adopted by the Court of Appeals for the Second Circuit in REA Express is fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code. The rights of workers under collective bargaining agreements are important, but the REA Express standard subordinates the multiple, competing considerations underlying a Chapter 11 reorganization to one issue: whether rejection of the collective bargaining agreement is necessary to prevent the debtor from going into liquidation. The evidentiary burden necessary to meet this stringent standard ... will interfere with the reorganization process (emphasis added)." [18]

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[15] Op Cit, In re Bildisco, see fn. 7.

[16] In re Brada-Miller Freight System, Inc., 702 F. 2d 890 (CA 11 1983).

[17] Brotherhood of Railway and Airline Clerks v. REA Express, Inc., 523 F. 2d 164 (CA 2), cert. denied, 423 U.S. 1017 (1975).

[18] Op Cit, see fn. 2, at 10-11.

The REA Express standard, and the Court's strong, direct, and unanimous rejection of it, are particularly relevant because proponents of H.R. 5174's labor provisions have labeled their amendments a codification of REA Express. 19/ H.R. 5174's labor provisions actually go much further because they: (1) impose a much stricter standard; 20/ and (2) include additional requirements, such as preconditions to the filing for abrogation, thereby introducing concepts REA Express did not address.

(B) The Interests at Stake In the Reorganization Process

In rejecting the more stringent standard, the Court clearly articulates a framework for considering the competing interests at stake in reorganization, acknowledging that while union-bargained wages and benefits are "important," they represent only one element in a wide spectrum of "multiple, competing considerations," all of which are also important and which, in the aggregate, far outweigh the parochial concerns of the union. 21/

The Bildisco decision therefore establishes a salient Court doctrine — that the singular interests of employee-bargained contracts do not subrogate the multiple legal and societal interests of an ailing business' fight for survival.

19/ E.g., the March 19, 1984 "Dear Colleague" letter from Rep. Rodino to the House states: "The bill (H.R. 5174) would require the bankruptcy judge to apply the standard used in the Second Circuit REA Express opinion in determining whether to approve a request for a rejection of a collective bargaining agreement under the bankruptcy laws."

20/ H.R. 5174 includes an unprecedented focus on preservation of jobs, and a two-step rather than single step test as in REA Express.

21/ Op Cit, see fn. 18.

The paramount societal interests include:

- The preservation of jobs;
- The protection of wages and conditions of employment for non-union employees; [22/]
- The protection of these same interests -- wages and conditions of employment — for management personnel;
- The maintenance of creditors' rights, including providing for the most equitable financial allocations; [23/]
- The protection of the interests of the shareholders, especially in assuring the greatest opportunity for a successful rehabilitation of the company; and
- The prevention of business failures with their attendant economic dislocations.

To disrupt the balance in our bankruptcy and labor laws may well create legal chaos for all parties affected by a Chapter 11 reorganization. Enactment of the labor provisions of H.R. 5174 or similar legislation would depredate the majority of interests to the satisfaction of a single parochial interest.

As mentioned earlier, one prominent interest which would be disadvantaged in nonunion employees. More than 80 percent of the American work force is not unionized. Enactment of legislation which would reverse Bildisco would force financially troubled employers to extract wage and benefit concessions and deferrals only from their nonunion employees. Furthermore, layoffs would also be confined to nonunion employees if the relevant collective bargaining agreement has work guarantee provisions. The nonunion employees would have to bear the

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[22/] A great many companies, of course, have work forces which are part union and part nonunion. An example is Bildisco and Bildisco. To the extent that unionized employees are insulated from wage and benefit concessions, these concessions must be extracted from the sector of the company's work force which is nonunion.

[23/] Both during the reorganization process and, in the event the reorganization fails, during the distribution of assets in liquidation.

total brunt of reorganization disadvantages, while union employees would threaten the economic survival of their employer and coworkers without an incentive to compromise. Legislation such as H.R. 5174 discriminates against nonunion workers.

Of course, such labor provisions would also be unfair to the wide spectrum of creditors of a financially troubled employer either by precipitating company liquidation or by requiring disproportionate sacrifices from the creditors.

(C) The Relationship of Labor and Bankruptcy Laws Based on the Ultimate Purpose of Chapter 11

The Court established another important — and appropriate — legal principle: labor laws not only do not take priority over the bankruptcy, commercial, and corporate laws relevant to a Chapter 11 reorganization, labor laws are subordinate to these competing legal interests. The reason is the more fundamentally necessary purpose in the context of reorganization of bankruptcy law vis-à-vis labor relations law.

The Supreme Court held that "the policy of the NLRA ... is to protect the process of labor negotiations, not to impose particular results on the parties," [24] while, on the contrary, "the policy of Chapter 11 is to permit successful rehabilitation of debtors." [25] Within reorganization, labor law therefore is process-oriented, while bankruptcy law is results-oriented.

What are those desired results? The Court cites the legislative history of the Bankruptcy Reform Act of 1978:

> "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." [26]

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[24] Op Cit, see fn. 2, at 19.

[25] Ibid, at 12.

[26] H.R. Rep. No. 95-595, p. 220 (1977), as cited, Ibid, at 13.

In Chapter 11, no objective can be paramount to rehabilitation of the ailing business — an objective which is in the interests of all affected parties.

Justice Rehnquist, writing for the unanimous Court, reasoned that:

> "(T)he Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities.[27] The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization (emphasis added)."[28]

(D) Substantive and Procedural Jurisdiction of the NLRB in the Wake of Bildisco

In staking out the relationship of our labor laws to bankruptcy proceedings, the Bildisco decision also set clear jurisdictional parameters, significantly limiting the NLRB's authority in regard to employers reorganizing under Chapter 11. The decision represents a watershed reversal of the earlier expansionist tendencies of the Board which prevailed in the 1970's.

Rejecting the Board's findings of unfair labor practices by the company, the Supreme Court held:

> "(T)he filing of the petition in bankruptcy means that the collective bargaining agreement is no longer immediately enforceable, and may never be enforceable again. Consequently, Board enforcement of a claimed violation of § 8(d) (of the NLRA)

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[27] "These equities" refer to the Court's further statement of the interests at stake in reorganization, interests far beyond the preservation of union wage rates. The Court held: "Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties -- the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardships each may face." Ibid, at 12.

[28] Ibid.

> under these circumstances *would run directly counter to the express provisions of the Bankruptcy Code* and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space ... any corresponding duty to bargain to impasse under § 8(a)(5) and § 8(d) (of the NLRA) before seeking rejection *must also be subordinated to the exigencies of bankruptcy* (emphasis added)." 29/

Furthermore, the Court cites the "national labor policies" which favor:

> "employers and unions reach(ing) their own agreements on terms and conditions of employment *free from governmental interference*. The Bankruptcy Court need step into this process only if the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization (emphasis added)." 30/

The Court's preference for *voluntary* negotiations between the financially troubled employer and the union, and the minimizing of "governmental interference" is unmistakable.

However, the labor provisions of H.R. 5174, and similarly drafted amendments, are counterproductive to these goals because they:

- Discourage voluntary concessions on wages and benefits by the union because not only would the union's ability to delay the process be enhanced, it would become in the union's interest to do so (thereby forestalling any required union concession and forcing the financially troubled employer to extract concessions elsewhere — from nonunion workers, management, and creditors);

- Impede resolution of labor-management disagreements by establishing complex, time-consuming, and heretofore undefined new rights and duties, thereby assuring delay;

29/ Ibid, at 17-18.

30/ Ibid, at 11.

- Increase "governmental interference" by mandating new procedures, more court involvement, and the rendering of labor law judgments by Bankruptcy Court judges (who currently can concentrate on the more fundamental goal of equitable rehabilitation); and

- Decrease the likelihood of voluntarily entered into agreements because management's position in negotiations would be so severely undercut by the labor relations imbalance created by such provisions.

If the labor provisions result in most financially troubled unionized employers being denied the ability to abrogate their union contracts, then the "governmental interference" the Court objected to will have reached its pinnacle. Clearly prohibition is the ultimate governmental interference.

(E) A Defense of the "Balance of Equities" Test

As discussed earlier, the Supreme Court ruled 9-0 that the Bankruptcy Courts can permit a debtor-in-possession to reject a collective bargaining agreement. The Court also ruled 9-0 that the test for when the Bankruptcy Court can permit abrogation of the union contract is a showing that the contract "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." [31]

The Court's holding is specific, timely, and unanimous. Furthermore, the Court actually adopted the middle ground position in supporting the "balance of equities" test, choosing a compromise between the more stringent "last resort" test of REA Express, and the less stringent "business judgment" test applied by bankruptcy judges to all other executory contracts.

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[31] Op Cit, see fn. 3.

The Court therefore already has accorded special treatment to union contracts to safeguard the interests of union workers and to distinguish, in the reorganization process, labor contracts from contracts for goods and services. In fact, the Court made this distinction despite specifically noting the lack of evidence of Congressional intent to consider labor contracts separately. [32]

The "balance of equities" test also serves the interests of our national labor policies by encouraging organized labor to come to the bargaining table with realistic expectations prior to the employer's filing in bankruptcy under Chapter 11. Whereas the "last resort" test and the deleterious mechanics provided for in H.R. 5174 and similar legislation encourage -- indeed, reward -- delay, the less stringent "balance of equities" test forces labor to realize that contract abrogation is entirely possible and that serious negotiations regarding concessions up front are in fact the most realistic and responsible course of action for employer and employee alike.

As noted earlier, a unanimous Supreme Court rejected the stricter REA Express standard. In fact the rejection was by more than a unanimous

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[32] The Supreme Court, noting that Congress had exempted collective bargaining agreements under the Railway Labor Act from abrogation as executory contracts under § 365(a) of the Bankruptcy Code, said: "Obviously, Congress knew how to draft an exclusion for collective bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective bargaining agreements covered by the NLRA .... Although there is no indication in § 365 of the Bankruptcy Code that rejection of collective bargaining agreements should be governed by a standard different from that governing other executory contracts .... because of the special nature of a collective bargaining contract, and the consequent "law of the shop" which it creates ... a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective bargaining agreement." Op Cit, see fn. 2, at 7-9.

Supreme Court -- 14 Federal judges at four levels and from both ends of the philosophical spectrum unanimously rejected REA Express and unanimously embraced "balance of equities." [33]

That such a cross-section of Federal jurists should agree on the "balance of equities" standard should not be surprising. In fact, the consensus of support spreads much wider.

The National Bankruptcy Conference, the preeminent society of bankruptcy scholars, practitioners, and jurists whole-heartedly endorsed the Bildisco standard in a letter to Rep. Rodino on March 5, 1984. [34] The National Bankruptcy Conference recommended legislative codification of the "balance of equities" standard, and rejected any deviation:

> "The Conference fears that a stricter standard would be difficult, if not impossible, to apply in a Chapter 11 case, particularly in the early stages." [35]

Representative Dan Lungren of California referenced the National Bankruptcy Conference letter in his remarks on the House floor on March 21, 1984, citing Professor King's point that a stricter standard than "balance of equities" is, from the practitioners' point of view "difficult, if not impossible." [36]

33/ The 14 Federal judges are the Federal Bankruptcy Court judge, the U.S. District Court judge, a unanimous three-judge Third Circuit Court of Appeals panel, and a unanimous nine-Justice Supreme Court.

34/ Letter from Lawrence P. King, Professor, New York University School of Law, representing the National Bankruptcy Conference, to the Honorable Peter W. Rodino, Jr. (the sponsor of H.R. 4908 and H.R. 5174, and the Chairman of the House Judiciary Committee), dated March 5, 1984. Professor King explained that the National Bankruptcy Conference had considered H.R. 4908 at its February 29, 1984 meeting and concluded that: "The Conference believes the bill, if enacted, could have an extremely adverse effect on the efforts of companies to reorganize under Chapter 11 of the Code and would make it impossible for some companies to reorganize.

35/ Ibid.

36/ Ibid.

Representative Lungren said:

> "In other words, we may be venturing into uncharted waters in hopes of trying to do something on behalf of the workers that would be affected and, in fact, doing something that will provide them with the wonderful opportunity of no longer having jobs. This is because if the standard is so high that a particular company does not have the opportunity to reorganize, but must continue on for a short period of time until they actually find themselves in insolvency; those jobs are no longer protected." 37/

The National Bankruptcy Conference's conclusions make a very practical "real world" case for retention of the Bildisco decision. Beyond the purpose of the Chapter 11, beyond the priority of bankruptcy law over labor relations law in reorganization, beyond the merits of considering multiple interests instead of a singular one, and beyond the inherent fairness of a "balance of equities" test that is by name equitable, there are very real doubts whether a stricter standard could, on a practical level, be administered.

Besides being most appropriate, the "balance of equities" test is the only standard feasible.

(F) A Defense of Unilateral Abrogation

Organized labor, and its allies in Congress, also have taken the offensive against the Supreme Court's ruling that financially troubled employers can abrogate their union contracts pending reorganization in the Bankruptcy Court.

The issue is: whether a company can cancel its collective bargaining agreement after filing under Chapter 11, but before final acceptance of the reorganization by the Bankruptcy Court

The answer from the Supreme Court is: "yes." The answer for very sound policy reasons must remain "yes."

37/ Congressional Record, March 21, 1984, p. H 1814.

An employer on the brink of collapse must act quickly, or be over that brink. Immediate relief can be critical to a Chapter 11 reorganization, especially for labor-intensive businesses. To delay that relief, and deny the financially troubled business necessary flexibility, is to issue a corporate death sentence.

The Supreme Court recognized this necessity:

> "(T)he authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization ... the Board and the Union nonetheless insist that a debtor-in-possession violates § 8(a)(5) and § 8(d) of the NLRA if it unilaterally changes the terms of the collective bargaining agreement ... acceptance of such a contention would largely, if not completely, undermine whatever benefit the debtor-in-possession otherwise obtains by its authority to request rejection." [38]

Efforts to reverse Bildisco legislatively have focused on an "expedited hearing" process in lieu of the employer right of unilateral abrogation. "Expedited hearing" is, for the most part, a misnomer because:

- The hearings provided for generally have a time certain commencement date, but not a time certain decision date. To move up the commencement of a hearing to two weeks rather than four or five weeks offers little consolation to an employer who must endure — without relief — a six or twelve or eighteen month reorganization process; [39]

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[38] Op Cit, see fn. 2, at 13-14.

[39] Braniff's reorganization took 18 months to accomplish; Continental Airlines filed on September 24, 1983 and is still awaiting final resolution.

- Even with a time certain decision date, the process is subject to extensive delay. H.R. 5174 and the Senate "compromise" labor provisions both have extensive preconditions to the filing for contract abrogation. The opportunity for union delay -- through negotiation, proposals/counterproposals, discovery, and the analysis of "financial and other information" 40/ could effectively "freeze" union wage and benefit rates; and

- The administrative process is subject to delay regardless of what "expedited" procedures are written into the law. As is the situation regarding the issue of strict abrogation tests, 41/ there is a serious question as to the feasibility of "expedited hearings." 42/

Regardless whether "expedited hearings" on contract abrogation are feasible, unilateral abrogation is necessary and appropriate.

40/ Union access to "relevant financial and other information" is provided for in H.R. 5174, § (d)(1)(B), p. 83.

41/ The National Bankruptcy Conference concluded that a stricter test than "balance of equities" would be "difficult, if not impossible" to administer. Op Cit, see fn. 34.

42/ Large, complicated cases are not likely to be resolved within quick time frames; nor is that desirable by employers or unions. Despite time certain provisions in § 362 of the Bankruptcy Code (dealing with secured creditor proceedings), Bankruptcy Courts routinely disregard the time requirements. Most often there is inadequate financial information and data to make such a decision (on contract abrogation) within a short time frame. Bankruptcy judges simply will not make final decisions quickly (despite what the law says), and cannot make them effectively with the information that is usually available at that stage of the proceedings.

If the company was not justified in cancelling the union contract, the employer will be liable for back wages and benefits, and must "make whole" employees on other contract provisions. 43/

If the employer is justified in cancelling the union contract, the chances of rehabilitation under Chapter 11 are greatly enhanced and, correspondingly, the likelihood of preservation of jobs is similarly enhanced.

The right of financially troubled employers to unilaterally abrogate their union contracts is also extremely important to the interest of preserving recapitalization opportunities.

Justice Rehnquist writes:

> "In some cases reorganization may succeed only if new creditors infuse the ailing firm with additional capital. We recognized the desirability of an analogous infusion of capital in Burns 44/ ... a similar recapitalization could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior collective bargaining agreement." 45/

43/ As a practical matter, most union contract abrogations under Chapter 11 are upheld, evidencing further justification for unilateral abrogation and the rarity of abuse. Charles O'Connor, a partner in the Washington, D.C. law firm of Morgan, Lewis & Bockius recently reported that in reviewing Labor Law Reports: "in the past two years, twenty-two cases involving the rejection of collective bargaining agreements were reported, and in nineteen of those cases the employer was successful," Charles O'Connor, "Is an Accommodation Possible Between Bankruptcy and Labor Law?," Labor Relations in Transition: Bankruptcy Law vs. Labor Law, Center for the Study of American Business, Washington University, March, 1984.

44/ NLRB v. Burns Security Services, Inc. 406 U.S. 272 (1972).

45/ Op Cit, see fn. 2, at 13.

Rehabilitation is a two-fold process: (1) abrogating certain liabilities; and (2) attracting investment capital. Banks may be dissuaded from making loans to ailing businesses trying to rebound if financially excessive or restrictive labor agreements cannot be abrogated — or if the uncertainty of abrogation causes these contracts to remain in limbo. Potential investors may be similarly dissuaded.

Without a right of unilateral abrogation of union contracts, most employers may as well file in Chapter 7 liquidation, rather than Chapter 11 reorganization. It is essential that the right of unilateral abrogation be maintained.

(G) Existing Safeguards Against Abuse

Formidable safeguards exist to prevent the misuse of the reorganization process by employers simply to void their union contracts. The evidence of abuse is rare, and certainly not of the magnitude to justify the massive AFL-CIO push on labor/bankruptcy which threatens much more meaningful and necessary bankruptcy reform legislation.

The Court mentioned some of these safeguards in its Bildisco opinion:

> "Before acting on a petition to modify or reject a collective bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution ... the debtor-in-possession (is) under a duty to bargain with the union under § 8(a)(5) of the NLRA 46/ .... a debtor-in-possession is an "employer" within the terms of the NLRA ... and is obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court." 47/

46/ Ibid, at 11.

47/ Ibid, at 19.

The safeguards against abuse of Chapter 11 are:

- It is unlawful — and always has been — for a company to use Chapter 11 to rid itself of a union contract. This is the status of bankruptcy law as it has evolved without deviation. An employer is still subject to procedural and equitable review, and must demonstrate economic necessity of a very significant nature;
- The debtor-in-possession does retain a duty to bargain in good faith with the union both prior to and after filing for contract abrogation (in fact, as pointed out earlier, this is an obligation the Bankruptcy Court should consider in its "balancing of equities");
- The union retains its representative status;
- The union retains its rights to engage in good faith bargaining, its rights to picket and lead consumer boycotts, and its rights to shut down a work site with a strike;
- If the Bankruptcy Court rejects the employer's contract abrogation, the collective bargaining agreement becomes enforceable, employees have a priority claim for wages and benefits, the employer is liable for back wages and benefits, and the employer is responsible for "making whole" employees who have been disadvantaged by "violations" of other labor contract provisions (for example, no subcontracting out provisions or work guarantee clauses);
- The employer could be held liable for perpetration of fraud in extreme cases of willful misrepresentation, which would of course carry substantial criminal and civil penalties; and

- Labor contracts are already accorded preferred status. To extract concessions from a union employee, the employer must satisfy the more stringent "balance of equities" test; for a nonunion employee the test is merely "business judgment."

However, the biggest safeguard against abuse is that employers simply do not take filing in bankruptcy lightly. The negative ramifications of filing in bankruptcy are enormous. The employer loses control of his business, becomes responsible to a bankruptcy judge and creditors' committee, tarnishes his image, spends a great deal of time in legal proceedings, and jeopardizes his relationship with customers, suppliers, advertisers, and creditors.

Effective safeguards currently exist to prevent the misuse by employers of our bankruptcy laws to void union contracts, and such misuse occurs infrequently, if ever.

V. Conclusion

The use of the bankruptcy laws to abrogate a union contract is not a typical labor relations practice in the United States today.

While proponents of the legislation which would reverse the Supreme Court's unanimous Bildisco decision complain of "union busting," the truth is that this is a non-issue and a non-problem.

The real issue is whether the AFL-CIO can hold hostage necessary Bankruptcy Code reforms to secure an advantage in its union organizing campaigns ... and the real problem is failing businesses and unemployed workers. This year 25,000 ailing businesses will struggle to remain solvent, filing under Chapter 11 for reorganization. A majority will fail. If the labor provisions of H.R. 5174, or labor provisions akin to those included in H.R. 5174, are enacted, many more businesses will fail.

At stake are the viability of these businesses and jobs, the integrity of our court system, the carefully constructed balance in our labor and bankruptcy laws, and the ability of Congress to resist an abusive display of special interest politics which is poised to compromise our legislative process.

The Supreme Court's Bildisco decision should not be reversed.

When bankruptcy legislation is considered by the Senate, I respectfully urge you to oppose any labor amendments that would have the effect of reversing or altering the Bildisco decision. If such amendments are included in the bankruptcy "package," I urge you to oppose the entire bill.

I thank you for the opportunity to appear before you today and discuss these important issues and the Chamber's position on them.

The CHAIRMAN. Thank you Mr. Thompson.

Mr. Irving, you may proceed.

STATEMENT OF JOHN S. IRVING, ATTORNEY AT LAW, KIRKLAND & ELLIS, WASHINGTON, DC, AND CHAIRMAN, LABOR LAW ADVISORY COMMITTEE, NATIONAL ASSOCIATION OF MANUFACTURERS; ACCOMPANIED BY F.M. LUNNIE, JR., ASSISTANT VICE PRESIDENT FOR INDUSTRIAL RELATIONS, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. IRVING. Mr. Chairman and members of the committees, I am John Irving, a partner in the law firm of Kirkland & Ellis, where I have been practicing law since 1979. From 1975 until 1979, I was the General Counsel of the National Labor Relations Board. I appear before the committees today as the chairman of the National Association of Manufacturers' Labor Law Advisory Committee, and accompanying me is Mr. Lunnie, the assistant vice president.

NAM is a voluntary business organization of over 13,500 corporations, large and small. NAM member companies employ 85 percent of all workers in manufacturing and produce over 80 percent of the Nation's manufactured goods.

We appreciate the opportunity to participate in the committees' examination of H.R. 5174. Although there are many important provisions in the measure, my comments will be directed to strongly opposing subtitle C of title 11. That subtitle would summarily reverse, in its totality, a February 22, 1984, ruling by the Supreme Court in *NLRB* v. *Bildisco.* In that case, the Court made two fundamental rulings, and it is important to distinguish between them, for they have been intentionally confused and comingled by organized labor in its effort to reverse the Court's holding in its entirety.

First, a unanimous Court ruled that a burdensome executory labor contract may be set aside only after balancing all of the equities, including the interests of the employees covered by the contracts, other creditors, and the needs of the debtor in connection with its efforts to reorganize its business. The Court specifically rejected the view that labor contracts, like commercial contracts, should be subject to the liberal "business necessity" test for rejection. So, too, the Court rejected the "strict" test for rejection urged by organized labor and the NLRB, that is, that labor contracts can be rejected only if the debtor can prove that rejection is necessary to avoid collapse. A unanimous Court agreed that this strict standard, derived from the Second Circuit's holding in *REA Express* was "fundamentally at odds with the policies of flexibility and equity built into chapter 11" of the Bankruptcy Code.

The second holding in *Bildisco* was rendered by a divided court. By a 5 to 4 majority, the Court held that a labor contract is unenforceable against a debtor-in-possession from the time the chapter 11 petition is filed by the debtor until the contract is rejected by a bankruptcy court. It is the second portion of this decision to which organized labor objected so violently. In the process, however, labor unions have willfully confused the Court's two fundamental holdings in an attempt to ensure legislative reversal of both.

To be sure, organized labor seeks legislative action to ensure that labor contracts cannot be unilaterally abrogated prior to formal rejection by a bankruptcy court. In the process, however, organized labor is seeking legislative imposition of the very standard for rejection which was unanimously rejected by the Court as being "fundamentally at odds" with the policies of the Bankruptcy Code.

The public interest demands that these two issues be kept separate and distinct and that organized labor not be permitted to lump them together in a way that might cause the unwitting rejection of both elements of the Court's *Bildisco* decision. If the balancing-of-the-equities standard for rejection adopted by the unanimous Court is abandoned in favor of a test that is "fundamentally at odds" with the bankruptcy laws, not only debtors and creditors will be harmed but employees and the public as well.

The insulation of labor contracts from the effects of reorganization and the threat of rejection, as urged by organized labor, will effectively deprive the bankruptcy system of an important option in effecting the rehabilitation of the chapter 11 debtor. Even where it was the labor contract in the first instance which drove the debtor into chapter 11, the labor contract would be immunized by organized labor's rejection standard unless total collapse is the only other alternative facing the debtor. This strict standard may be in the special interest of organized labor, for instance, as an organizing tool, but it doubtlessly would ensure the effective repeal of chapter 11 as a needed haven for debtors who in good faith file for protection from their creditors in order to reorganize their businesses.

If organized labor's efforts are allowed to succeed, as they already have in the House, many more debtors will be driven from chapter 11 reorganization into chapter 7 liquidation. Indeed, distressed companies with burdensome union contracts may be dissuaded from attempting to reorganize at all and, instead, will be forced into liquidation in the first instance. It is difficult to understand how labor's special interest demands translate into sound public policy or, for that matter, how the interests of unionized workers would be furthered by legislation which would seal the fate of their distressed employers and likely result in the permanent loss of their own jobs as well.

It should be made clear at this point that it is not the intention of the NAM or any other element of the business community to hold H.R. 5274 hostage. Rather, it is organized labor, and particularly the AFL-CIO, and its allies which have seized upon the deadline imposed by the Supreme Court's *Marathon* decision as a means of bypassing the normal "notice and hearing" process. Despite strong protests from the business community, organized labor and its allies succeeded in rushing a labor amendment reversing *Bildisco* in its totality through the House on March 21, 1984, without the benefit of a single hearing or any meaningful debate.

In this power-play effort, organized labor and its allies succeeded in so clouding and shrouding their real special-interest objectives that most Members of the House had not the vaguest idea of the fundamental error they were making. Organized labor was successful in the House in camouflaging its attempt to have all of *Bildisco* reversed by orchestrating its emotional and misleading objections to the Supreme Court decision. One example of this organized hysteria came from the AFL-CIO's executive council immediately after the Court issued its decision:

> The Supreme Court of the United States, in accord with its normal pro-business leanings, has now granted employers wide permission to use the bankruptcy laws to destroy collective bargaining.

The Court did nothing of the sort. What the Court did was reject a test advanced by organized labor which would have made it virtually impossible for a burdensome union contract to be rejected, even if that contract drove the employer into chapter 11 in the first place.

In no sense did the Court's decision "destroy collective bargaining." Indeed, it was labor's test which would have discouraged meaningful bargaining needed to save a debtor by eliminating the risk for unions that their contracts might be set aside and, thus, by eliminating the incentive needed to encourage the kind of bargaining between debtors and unions which would promote debtor rehabilitation and the preservation of jobs. Taking other quotations from the dissenting opinion out of context, the AFL-CIO's executive council made it sound as if the end of collective bargaining and labor contracts was at hand.

The fact is, nothing could be further from the truth. In the first place, no employer in his right mind lightly schemes, as organized labor would have it, to invoke the bankruptcy laws as a device for ridding itself of a union. Let there be no mistake about it, chapter 11 is an onerous, expensive, and unpredictable procedure which any employer would rather avoid.

It results in a court looking over management's shoulder at every step; in a creditor's committee wrangling about how the employer's liabilities should be apportioned; in banks and other creditors being unwilling to advance credit and capital needed for survival; in suppliers unwilling to deal with a debtor except on a cash basis; in customers looking for other, more reliable, sources of supply; and in skilled managers and workers looking for other jobs to ensure the security of their futures.

No, there is nothing about Chapter 11 which makes a debtor the envy of its competitors. And there is nothing about the Supreme Court's decision in *Bildisco* that signals an end to collective bargaining or industrial peace and stability. Nevertheless, organized labor has succeeded, at least in the House, in misleading concerned legislators and the public into believing that nothing less than the survival of industrial peace is at stake.

Despite labor-generated accusations of abuse by employers of the bankruptcy laws, concrete examples are isolated if they exist at all. In the much publicized case of Continental Airlines, union claims that the company abused the bankruptcy laws by filing a chapter 11 petition when it was not completely insolvent and that rejection of its labor contracts was a device to undermine unionism, were specifically rejected by the bankruptcy court. The *Wilson Foods* example has resulted in renegotiated labor contracts, a continuation of operations, and no finding by any court that Wilson abused the bankruptcy laws in any way. Braniff International would not be flying today without an infusion of new capital, an infusion which would have been impossible without the rejection of Braniff's labor contracts.

It is interesting that organized labor has not focused on the case of Rath Packing Co. Rath filed for chapter 11 reorganization and the rejection of its contract with the United Food and Commercial Workers Union, and that rejection has been approved by the bankruptcy court. Rath was an employee-owned business. It was an employee-owned business at the time it filed its chapter 11 petition, and it was an employee-owned business at the time it filed to reject its labor contract.

Nothing about these examples suggests a single reason why the balancing-of-the-equities standard for rejection should be abandoned in favor of the unworkable strict standard urged by organized labor. Nothing about these examples argues for a major change in public policy which would, in effect, repeal chapter 11 for distressed employers with burdensome union contracts.

In fact, another case example demonstrates clearly that the present system works well and fairly. Eastern Airlines spoke frankly with its unions about the chapter 11 alternative if its burdensome labor contracts were not renegotiated. Eastern openly demonstrated its financial situation to its unions. New labor contracts were negotiated which avoided the necessity of chapter 11 altogether and which have permitted the carrier to continue to operate.

Before implementing a law which would immunize contracts from rejection, the Congress should ask itself whether Eastern's unions would have been as helpful and willing to compromise constructively if they had been certain that their contracts could not be rejected in any event. It is precisely this incentive to negotiate which organized labor seeks to remove from the Bankruptcy Code, in favor of a test which would actually discourage bargaining or postpone bargaining until it is too late to do any good.

The objective of the NAM since the *Bildisco* decision has been to separate fact from fiction and to encourage reasoned debate and analysis before Congress is misled into abandoning the balancing test for labor contract rejection which, in the Supreme Court's unanimous view, was the only test that properly reconciled the competing interests of the labor and the bankruptcy laws.

To reiterate then, we should not waste our time debating here today whether chapter 11 reorganization is an attractive alternative for distressed employers. It is not. Neither are we here to debate whether burdensome labor contracts can be set aside in chapter 11. All courts which have ever considered the question have agreed unanimously that labor contracts can be rejected. Nor are we here to debate whether chapter 11 should be available as a device for employers to use in bad faith to rid themselves of their unions or their labor contracts. It should not, and all courts which have ever considered such questions have agreed that it should not.

To debate any of these issues would be a waste of your time and ours, for, as to each, the law is well settled. Rather, the purpose of our testimony today is to sharpen the issues and to caution against acceptance of organized labor's hysterical appeals concerning the future of collective bargaining and its insincere attempts to mislead the Congress into believing that the balancing-of-the-equities test adopted by the Supreme Court will stampede employers into chapter 11 reorganization in order to abrogate their labor contracts. Instead, it is the test for contract rejection which labor urges, a test rejected by a unanimous Court, that will lead to a fundamental undermining of the bankruptcy laws and, predictably, to a higher incidence of liquidations among unionized employers. If the imminency of collapse becomes the test, as organized labor would have it, it is the public as well as unionized employees and others who will suffer in the long and in the short run.

[The prepared statement of Mr. Irving follows:]

Testimony of

John S. Irving, Esquire
Chairman, Labor Law Advisory Committee
National Association of Manufacturers

before the

Committee on the Judiciary and
Committee on Labor and Human Resources

on

H.R. 5174, Bankruptcy Amendments of 1984

April 10, 1984

Mr. Chairman and members of the Committees. I am John S. Irving, partner in the law firm of Kirkland and Ellis where I have practiced law since 1979. From 1975 to 1979 I was the General Counsel of the National Labor Relations Board. I appear before you today in my capacity of Chairman of the National Association of Manufacturers' Labor Law Advisory Committee. Accompanying me is F. M. Lunnie, Jr., NAM's Assistant Vice President for Industrial Relations.

NAM is a voluntary business association of over 13,500 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 manufacturing firms, each with an employee base of less than 500. NAM member companies employ 85 percent of all workers in manufacturing and produce over 80 percent of the nation's manufactured goods. NAM is affiliated with an additional

158,000 businesses through its Associations Council and the National Industrial Council.

We appreciate the opportunity to participate in the Committees' examination of H.R. 5174. Although there are many important provisions in the measure, my comments will be directed to strongly opposing Subtitle C of Title 11. That Subtitle would summarily reverse, in its totality, a February 22, 1984, ruling by the Supreme Court in NLRB v. Bildisco & Bildisco. In that case, the Court made two fundamental rulings, and it is important to distinguish between them, for they have been intentionally confused and commingled by organized labor in its effort to reverse the Court's holding in its entirety.

First, a unanimous Court ruled that a burdensome executory labor contract may be set aside only after a careful balancing of all of the equities, including the interests of employees covered by the contracts, other creditors, and the needs of the debtor in connection with its efforts to reorganize its business. The Court specifically rejected the view that labor contracts, like commercial contracts, should be subject to the liberal "business necessity" test for rejection. So too, the Court rejected the "strict" test for rejection urged by organized labor and the NLRB, i.e., that labor contracts can be rejected only if the debtor can prove that rejection is necessary to avoid collapse. A unanimous Court agreed that this strict standard, derived from the

Second Circuit's holding in Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, 523 F.2d 164 (2nd Cir. 1975), was "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 [of the Bankruptcy Code]."

The second holding in Bildisco was rendered by a divided Court. By a 5 to 4 majority, the Court held that a labor contract is unenforceable against a debtor-in-possession from the time the Chapter 11 petition is filed by the debtor until the time the contract is rejected by the Bankruptcy Court. It is this second portion of the decision to which organized labor has objected so violently. In the process, however, labor unions have willfully confused the Court's two fundamental holdings in an attempt to ensure legislative reversal of both.

To be sure, organized labor seeks legislative action to ensure that labor contracts cannot be unilaterally abrogated prior to formal rejection by a Bankruptcy Court. In the process, however, organized labor is seeking legislative imposition of the very standard for rejection which was unanimously rejected by the Court as being "fundamentally at odds" with the policies of the Bankruptcy Code.

The public interest demands that these two issues be kept separate and distinct and that organized labor not be permitted to lump them together in a way that might cause the unwitting rejection of both elements of the Court's

Bildisco decision. If the "balancing of the equities" standard for rejection adopted by the unanimous court is abandoned in favor of a test that is "fundamentally at odds" with the bankruptcy laws, not only debtors and creditors will be harmed, but employees and the public as well.

The insulation of labor contracts from the effects of reorganization and the threat of rejection, as urged by organized labor, will effectively deprive the bankruptcy system of an important option in effecting the rehabilitation of the Chapter 11 debtor. Even where it was the labor contract in the first instance which drove the debtor into Chapter 11, the labor contract would be immunized by organized labor's rejection standard unless total collapse is the only other alternative facing the debtor. This strict standard may be in the special interest of organized labor, for instance, as an organizing tool, but it doubtlessly would ensure the effective repeal of Chapter 11 as a needed haven for debtors who in good faith file for protection from their creditors in order to reorganize their businesses. If organized labor's efforts are allowed to succeed, as they already have in the House, many more debtors will be driven from Chapter 11 Reorganization into Chapter 7 Liquidation. Indeed, distressed companies with burdensome union contracts may be dissuaded from attempting to reorganize at all and, instead, will be forced into liquidation in the first instance. It is difficult to understand how labor's special interest demands translate into sound public policy or, for that matter, how the interests of unionized workers would be furthered by legislation which would seal the fate of their distressed employers and likely result in the permanent loss of their own jobs as well.

It should be made clear at this point that it is not the intention of the NAM or other elements of the business community to hold H.R. 5174 hostage. Rather, it is organized labor, and particularly the AFL-CIO, and its allies which have seized upon the deadline imposed by the Supreme Court's Marathon decision as a means of bypassing the normal "notice and hearing" process. Despite strong protests from the business community, organized labor and its allies succeeded in rushing a labor amendment reversing Bildisco in its totality through the House on March 21, 1984, without the benefit of a single hearing or any meaningful debate.

In this power-play effort, organized labor and its allies succeeded in so clouding and shrouding their real special interest objectives that most Members of the House had not the vaguest idea of the fundamental error they were making. Organized labor was successful in the House in camouflaging its attempt to have all of Bildisco reversed by orchestrating its emotional and misleading objections to the Supreme Court decision. One example of this organized hysteria came from the AFL-CIO's Executive Council immediately after the Court issued its decision:

> "The Supreme Court of the United States, in accord with its normal pro-business leanings, has now granted employers wide permission to use the bankruptcy laws to destroy collective bargaining."

The Court did nothing of the sort. What the Court did was reject a test advanced by organized labor which would have made it virtually impossible for a burdensome union contract to be rejected, even if that contact drove the employer into Chapter 11 in the first place.

In no sense did the Court's decision "destroy collective bargaining." Indeed, it was labor's test which would have discouraged meaningful bargaining needed to save a debtor by eliminating the risk for unions that their labor contracts might be set aside, and, thus, by eliminating the incentive needed to encourage the kind of bargaining between debtors and unions which would promote debtor rehabilitation and the preservation of jobs. Taking other quotations from the dissenting opinon out of context, the AFL-CIO's Executive Council made it sound as if the end of collective bargaining and labor contracts was at hand.

The fact is, nothing could be further from the truth. In the first place, no employer in its right mind lightly schemes, as organized labor would have it, to invoke the bankruptcy laws as a device for ridding itself of a union. Let there be no mistake about it, Chapter 11 is an onerous, expensive, and unpredictable procedure which any employer would rather avoid. It results in a court looking over management's shoulder at every step; in a creditor's committee wrangling about how the employer's liabilities should be apportioned; in banks and other creditors being unwilling to advance credit and capital needed for survival; in suppliers unwilling to deal with a debtor except on a cash basis; in customers looking for other, more reliable sources of supply; and in skilled management and workers looking for other jobs to ensure the security of their futures.

No, there is nothing about Chapter 11 which makes a debtor the envy of its competitors. And there is nothing about the Supreme Court's Bildisco decision that signals an end to collective bargaining or industrial peace and stability. Nevertheless, organized labor has succeeded, at least in the House, in misleading concerned legislators and the public into believing that nothing less than the survival of industrial peace is at stake.

Despite labor generated accusations of "abuse" by employers of the bankruptcy laws, concrete examples are isolated if they exist at all. In the much publicized case of Continental Airlines, union claims that the Company abused the bankruptcy laws by filing a Chaper 11 petition when it was not completely insolvent and that rejection of its labor contracts were a device to undermine unionism, were specifically rejected by the Bankruptcy Court. The Wilson Foods example has resulted in renegotiated labor contracts, a continuation of operations, and no finding by any court that Wilson abused the bankruptcy laws in any way. Braniff International would not be flying today without an infusion of new capital, an infusion which would have been impossible without the rejection of Braniff's labor contracts. It is interesting that organized labor has not focused on the case of Rath Packing Company. Rath filed for Chapter 11 Reorganization and the rejection of its contract with the United Food and Commercial Workers Union has been approved by the Bankruptcy Court. Rath was an employee-owned business at the time and it was employee owned at the time its Chapter 11 petition was filed and at the time its labor contract was rejected.

Nothing about these examples suggests a single reason why the "balancing of the equities" standard for rejection should be abandoned in favor of the unworkable strict standard urged by organized labor. Nothing about these examples argues for a major change in public policy which would, in effect, repeal Chapter 11 for distressed employers with burdensome union contracts.

In fact, another case example demonstrates clearly that the present system works well and fairly. Eastern Airlines spoke frankly with its unions about the Chapter 11 alternative if its burdensome labor contracts were not renegotiated. Eastern openly demonstrated its financial situation to its unions. New labor contracts were negotiated which avoided the necessity for Chapter 11 altogether and which have permitted the carrier to continue to operate. Before enacting a law which would immunize labor contracts from rejection, the Congress should ask itself whether Eastern's unions would have been as helpful and willing to compromise constructively if they had been certain that their contracts could not be rejected in any event. It is precisely this incentive to negotiate which organized labor seeks to remove from the Bankruptcy Code in favor of a test which would actually discourage bargaining, or postpone bargaining until it is too late to do any good.

The objective of the NAM ever since the Bildisco decision has been to separate fact from fiction and to encourage reasoned debate and analysis before Congress is misled into abandoning the balancing test for labor contract rejection which, in the Supreme Court's unanimous view, was the only test that properly reconciled the competing interests of the labor and the bankruptcy laws. In furtherance of this objective, the NAM has repeatedly called for hearings to air the concerns of labor and management. To this end NAM President Alexander Trowbridge wrote to members of the House and Senate on March 5 urging hearings so that all points of view might be heard and considered. The NAM even sponsored a breakfast briefing on the Bankruptcy Code and collective bargaining agreements so that members of the House and Senate and their staffs might better understand the Bildisco decision and the important issues involved for labor and management.

To reiterate then, we should not waste your time debating here today whether Chapter 11 Reorganization is an attractive alternative for distressed employers. It is not. Neither are we here to debate whether burdensome executory labor contracts can be set aside in Chapter 11. All courts which have ever considered the question have agreed, unanimously, that labor contracts can be rejected. Nor are we here to debate whether Chapter 11 should be available as a device for employers to use in bad faith to rid themselves of their unions or their labor contracts. It cannot, and all courts which have ever considered such questions have agreed that it cannot.

To debate any of these issues would be a waste of your time and ours, for, as to each the law is settled. Rather, the purpose of our testimony today is to sharpen the issues and to caution against acceptance of organized labor's hysterical appeals concerning the future of collective bargaining and its insincere attempts to mislead the Congress into believing that the "balancing of the equities" test adopted by the Supreme Court will stampede employers into Chapter 11 reorganization in order to abrogate their labor contracts. Instead, it is the test for contract rejection which labor urges, a test rejected by a unanimous Court, that will lead to a fundamental undermining of the bankruptcy laws and, predictably, to a higher incidence of liquidations among unionized employers. If the imminency of collapse becomes the test, as organized labor would have it, it is the public as well as unionized employees and others who will suffer in the long and short run.

The CHAIRMAN. Thank you, Mr. Irving.

Mr. Liebenson, we turn to you.

STATEMENT OF HERBERT LIEBENSON, EXECUTIVE DIRECTOR, THE SMALL BUSINESS LEGISLATIVE COUNCIL, WASHINGTON, DC; ACCOMPANIED BY EUGENE GRANOF, ATTORNEY AT LAW, VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY, WASHINGTON, DC

Mr. LIEBENSON. Mr. Chairman, my name is Herbert Liebenson. I am appearing here today as executive director of the Small Business Legislative Council. I am also president of the National Small Business Association. Accompanying me today is Eugene B. Granof, of the law firm of Vedder, Price, Kaufman, Kammholz & Day.

The SBLC is an organization of 82 trade and professional associations, representing approximately 4.5 million small businesses nationwide. SBLC thus speaks for more than a quarter of the business firms of all types in this country. Small business accounts for over 40 percent of the total gross national product, creates about half of all industrial innovation, and is responsible for over 50 percent of new jobs in our economy. Indeed, during the years 1981 and 1982, small business as a whole produced 2.6 million new jobs, whereas big business lost 1.6 million jobs.

There were more than 95,000 business bankruptcy filings in fiscal year 1983. Of these, approximately 99 percent were by small business. Indeed, the typical bankruptcy business failure is likely to be small, employing fewer than 20 employees and owing from $25,000 to $100,000. *Bildisco,* which was the subject of the Supreme Court's decision, was itself a small employer with fewer than 50 employees.

Notwithstanding the highly publicized filings of such large companies as Continental Airlines and Wilson, when Congress has before it its major amendments to the bankruptcy laws, as it does at present, it is considering legislation which impacts significantly if not primarily on small businesses that are or will be fighting for survival. It would be a mistake for Congress to amend the Bankruptcy Code in a manner which reduces the chances of survival of the thousands of smaller businesses which are or will be undergoing bankruptcy reorganization merely because of perceived problems arising out of the relatively few bankruptcy filings involving large companies.

As the Supreme Court pointed out in *Bildisco,* the fundamental purpose of the chapter 11 bankruptcy reorganization is to permit successful rehabilitation of debtors instead of having them go into liquidation. Chapter 11 is designed to give debtors flexibility and breathing space, in order to maximize the opportunities for a successful recovery. We think that the flexibility and breathing space presently in the Bankruptcy Code, under the Supreme Court's reading of it in *Bildisco,* is especially needed by small businesses undergoing reorganization and should be essentially retained.

In particular, the *Bildisco* interpretation of the bankruptcy laws assists the survival of smaller businesses undergoing a bankruptcy reorganization in two major respects. First, *Bildisco* establishes a realistic and workable standard for bankruptcy judges to decide whether to permit rejection of a collective bargaining agreement, and the Supreme Court was unanimous on this point. The second point on which the Supreme Court was unanimous concerned the extent to which bargaining must take place before the bankruptcy court can act on a petition to modify or reject a collective-bargaining agreement.

The *Bildisco* decision steers a sound middle course. It holds that the bankruptcy court must be satisfied that reasonable efforts to negotiate a voluntary modification of the collective bargaining agreement have been made and are not likely to produce a prompt and satisfactory solution.

The one issue on which the Supreme Court was sharply divided in *Bildisco* is whether a debtor can, without violating the National Labor Relations Act, unilaterally modify a collective-bargaining agreement between the date of filing of a petition for bankruptcy and the date on which the bankruptcy court authorizes rejection or modification of the agreement. In our view, the majority holding that a debtor was entitled to effect such a unilateral modification is sound. Nevertheless, we would not oppose an amendment to the Bankruptcy Code which would require a debtor to obtain prior bankruptcy court approval for any contract modification.

But smaller businesses need certain protections in this regard. They do not have the resources for a protracted and complicated legal proceeding. Often, they do not even have access to specialized expertise necessary to deal with technical requirements of good-faith bargaining under the National Labor Relations Act. It is not atypical for the unionized small business to participate in collective bargaining in only a limited sense, either because the enterprise bargains through a multiemployer association or because it does not have economic power to resist union demands for so-called standard area contracts.

Hence, any amendment which limits the rights of the debtor under current law to effect unilateral modification of labor contracts should also provide for an expedited and prompt hearing on any motion to modify the contract; for reasonable limits on the proceedings so that the need for rapid determination is fully accommodated; for a reasonable standard in deciding whether a modification of the agreement should be permitted, and by reasonable we do not mean the overly harsh standard of whether reorganization will fail unless modification is permitted; for a reasonable requirement for discussions with the union concerning the modification beforehand, and by reasonable here we do not mean imposing the National Labor Relations Act's section 8(d) notice and waiting period requirements or of any obligation to bargain to impasse; for a reasonable requirement that a union cannot oppose a proposed modification unless it has responded with good-faith efforts of its own to the employer's prior request for discussions to achieve a voluntary accord; and for reasonable protection for disclosure of confidential business information which, if released, could be of assistance to competitors or otherwise harm the debtor's interests.

In conclusion, the small business community urges retention of the *Bildisco* interpretation of the bankruptcy law as providing the optimal means for obtaining the survival of small businesses during a reorganization. However, we would find acceptable an amendment requiring some form of approval, under the appropriate conditions we have stated, by an impartial decision-maker of any labor contract modifications made after the filing of the petition for bankruptcy. Thank you.

[The prepared statement of Mr. Liebenson follows:]

STATEMENT OF
HERBERT LIEBENSON
ON BEHALF OF
THE SMALL BUSINESS LEGISLATIVE COUNCIL
SENATE COMMITTEE ON LABOR & HUMAN RESOURCES
AND
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
HOLDING JOINT HEARINGS ON
THE BILDISCO DECISION: REJECTION OF COLLECTIVE BARGAINING AGREEMENTS
IN BANKRUPTCY REORGANIZATIONS
APRIL 10, 1984

Mr. Chairmen and members of the Committees, my name is Herbert Liebenson and I am appearing here today as Executive Director of the Small Business Legislative Council (SBLC). I am also President of the National Small Business Association (NSB). Accompanying me today is Eugene B. Granof of the law firm Vedder, Price, Kaufman, Kammholz & Day. The SBLC is an organization of 82 trade and professional associations representing approximately 4 1/2 million small businesses nationwide. SBLC thus speaks for more than a quarter of the business firms of all types in this country. That quarter, however, accounts for about 40% of the total gross national product, creates about half of all industrial innovation, and is responsible for a remarkable percentage of new jobs in our economy. Indeed, during the years 1981 and 1982, small business as a whole produced 2,650,000 new jobs, whereas big business lost 1,664,000 jobs.1/

According to the Administrative Office of the U.S. Courts, there were more than 95,000 business bankruptcy filings in fiscal year 1983, up significantly from 29,500 in 1979. By their very magnitude, these figures suggest that, notwithstanding the highly publicized filings of such large companies as Continental Airlines, Braniff, and Wilson Foods, the overwhelming number of bankruptcy filings are by small businesses. And in fact, more detailed statistics show that "Approximately 99 percent of all businesses filing for bankruptcy are small businesses.(32) Companies with fewer than 100 employees accounted for

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1/ Report of the President on the State of Small Business (March 19, 1984), p.2.

(32) Because many of the court listings omit the total debts of the filing entity, a pricise comparison between D&B data and Administrative Office of the U.S. Courts data is not possible. D&B publishes only the size of the liabilities of failing companies, but employment levels of the bankrupt companies can be obtained by matching names in the U.S. Courts records against the SBDB.

99.2 percent of the bankruptcies in 1981 and for 98.4 percent in 1982. Almost 75 percent of all bankrupt companies had under 20 employees in 1981-1982, while almost 50 percent of failing businesses had less than $100,000 in liabilities. Therefore, the 'typical' bankruptcy/business failure is likely to be small, employing fewer than 20 employees, and owing from $25,000 to $100,000." ("The State of Small Business: A Report of the President," March 1983.) (See Appendix for Industrial Distribution) Bildisco -- the employer which was the subject of the Supreme Court's Bildisco decision -- was itself a small employer with fewer than 50 employees.

So when Congress has before it major amendments to the bakruptcy laws, as at present, it is considering legislation which clearly impacts significantly, if not primarily, on small businesses that are fighting for their survival. Accordingly, we submit it would be a mistake for Congress to amend the Bankruptcy Act in a manner which reduces the chances of survival of the thousands of small businesses undergoing bankruptcy reorganization merely because of perceived problems arising out of the relatively few bankruptcy filings involving large companies.

As the Supreme Court pointed out in Bildisco, the fundamental purpose of a Chapter 11 bankruptcy reorganization is to permit successful rehabilitation of debtors instead of having them go into liquidation, with an attendant loss of jobs and possible misuse of economic resources. Accordingly, Chapter 11 is designed to give debtors "flexibility and breathing space" in order to maximize the opportunities for a successful recovery.

No one seems to be seriously questioning the basic policy or design of Chapter 11. What is at issue is whether the "flexibility and breathing space" currently in the Bankruptcy law, as interpreted by the Supreme Court in Bildisco with respect to collective bargaining agreements, should be retained.

We believe that it should, particularly because that flexibility and breathing space are especially needed by small businesses undergoing reorganization.

In this regard, several factors must be kept in mind. First, many small business are family owned Family members are not removed from, but tend to work alongside, the other employees. Relationships between owner/managers and employees are frequently close, personal, and longlasting; turnover is low. In such circumstances, when a small business files for bankruptcy under Chapter 11, the chances are remote that the filing is part of a grand "union busting" design or even a desire "to get rid of" the union. It is instead that the business is seeking the protection of the Bankruptcy laws for one plain and single objective: economic survival.

Second, small businesses by their very nature have extremely limited resources in terms of engaging in complex and protracted legal proceedings. Moreover, it is not at all uncommon that a small business will use as its regular legal counsel an attorney engaged in a general legal practice who does not have specialized knowledge of the National Labor Relations Act and particularly that Act's technical requirements for good faith bargaining.

Third, it is by no means atypical for small businesses which are unionized to participate in collective bargaining only in a very limited sense. Often, they are members of a multi-employer association whose representatives bargain on behalf of all members. If the association is large -- say with several hundred members -- most members will not have any direct bargaining table contact with the union. Individual association members, especially the small ones, may also have only very slight influence on the negotiations. Even when the small businessman who is unionized does not bargain through an association but deals directly with the union, the contract he signs may be a standard one presented to him largely on a take-it-or-leave-it basis or with only minimal room for modification. Realistically bargaining patterns are set by the largest firms in the industry, such as auto, steel and trucking.

In light of the foregoing, from the standpoint of small business the Bildisco interpretation of the Bankruptcy laws provides essential flexibility and breathing space in a Chapter 11 reorganization in two major respects. First, Bildisco established a realistic and workable standard for bankruptcy judges to decide whether to permit rejection of a collective bargaining agreement. The Supreme Court was unamimous on this point. It held that such a contract can be rejected if the debtor can show that the agreement burdens the contemplated reorganization and that, after careful scrutiny, the equities balance in favor of rejecting the labor contract. Significantly, this is a stronger showing than is required for rejection of other types of contracts, thus recognizing the special nature of labor agreements. Yet it does not force the debtor to meet an extremely harsh standard of proof, such as demonstrating that reorganization will fail unless the labor contract is rejected.

A second point on which the Supreme Court was unanimous concerned the extent to which bargaining must take place before the bankruptcy court can act on a petition to modify or reject a collective bargaining agreement. The Bildisco decision steers a sound middle course. It holds that the bankruptcy court must be satisfied that reasonable efforts to negotiate a voluntary modification of the collective bargaining agreement have been made and are not likely to produce a prompt and satisfactory solution. As Justice Brennan noted, to insist that a debtor-in-possession comply with the notice and waiting period requirements of § 8 (d) of the NLRA would interfere with the need for making rapid determinations in reorganizations. Forcing the debtor to bargain to impasse was rejected for the same reason as well as the additional reason that it would lead bankruptcy courts into an area beyond their expertise.

The one issue on which the Supreme Court was sharply divided in Bildisco is whether a debtor can, without violating the NLRA, unilaterally modify a collective bargaining agreement between the date of filing of a petition for bankruptcy and the date on which the bankruptcy court authorized rejection of modification of the agreement. A majority of the Justices held that a debtor was entitled to effect such a unilateral modification. We believe that the majority position is more consistent with the need for flexibility and breathing space in a small business reorganization than the opposing view of the minority. Nevertheless, we would not oppose an amendment to the Bankruptcy Code which would compel a debtor to obtain bankruptcy court approval for any labor contract modification if the amendment also provided:

1. For an expedited and prompt hearing on any motion to modify the contract;
2. For reasonable limits on the proceedings so that the need for rapid determination is fully accommodated;
3. For a reasonable standard in deciding whether a modification of the agreement should be permitted (which clearly would not be the overly harsh standard of whether reorganization will fail unless modification is permitted);
4. For a reasonable requirement for discussions with the union concerning the modification beforehand (but no imposition of the NLRA's § 8 (d) notice and waiting period requirements or of any obligation to bargain to impasse);
5. For a reasonable requirement that a union cannot oppose a proposed modification unless it has responded with good faith efforts of its own to the employer's prior request for discussions to achieve a voluntary accord; and

6. For reasonable protection for disclosure of confidential business information which, if released, could be of assistance to competitors or otherwise harm the debtor's interests.

In conclusion, the small business community urges retention of the Bildisco interpretation of the Bankruptcy law as providing the optimal means for obtaining the survival of small businesses during a reorganization. However, we would find acceptable an amendment requiring some form of approval, under appropriate conditions, by an impartial decision-maker of any labor contract modifications made after the filing of a petition for bankruptcy

Thank you for this opportunity to express our views.

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Appendix

Excerpt from "The State of Small Business"
A Report of the
President
Transmitted to the Congress March 1983

TABLE 6.11—*Industrial Distribution for Comparable Industries: Business Failures vs Business Bankruptcies:*
(1980–1982)

SIC Code	Title	Dun & Bradstreet Business Failures	U.S. Court Business Bankruptcies	Index: Failures/ Bankruptcies
10–14	Mining	0.83	0.18	4.61
15	General Bldg. Contractors	9.35	8.91	1.05
16–17	Bldg. Sub-contractors & Other Contractors	11.22	12.48	0.90
20	Food & Kindred Products	0.61	0.71	0.86
22–23	Textile Mill Products & Apparel Products	1.62	0.36	4.50
24	Lumber & Lumber Products	1.89	1.78	1.06
26–27	Paper, Printing & Publishing	1.48	2.49	0.59
28	Chemicals & Allied Products	0.36	0.36	1.00
31	Leather & Leather Products	0.14	0.18	0.78
32	Stone, Clay & Glass Products	0.47	0.36	1.31
33–34	Metals, Primary & Fabricated	1.43	2.49	0.57
35–36	Machinery	1.92	3.39	0.57
37	Transportation Equipment	0.80	0.36	2.22
38–39	Miscellaneous Manufacturing	2.43	0.71	3.42
40–47	Passenger & Freight Transportation plus Misc. Public Services	4.69	4.63	1.01
50–51	Wholesale Trade	8.64	11.76	0.73
52–59	Retail Trade	42.89	38.50	1.11
70	Hotels	0.51	1.43	0.36
72	Personal Services	1.79	0.89	2.01
73	Business Services	5.32	5.53	0.96
75–76	Repair Services	1.60	2.49	0.64
	Total: All Comparable Industries	100.00	100.00	1.00

Note: Data were not available for Agriculture; Manufacturing (SIC Codes 21, 25, 29 and 30); Communications and Public Utilities (SIC Codes 48 and 49); Finance, Insurance, & Real Estate; and, Selected Services (SIC Codes 78 thru 89).

Source: Court bankruptcy data were derived by matching data supplied by the U.S. Administrative Office of the Courts, Bankruptcy Division for the states of California, Florida and Illinois, with the Small business Data Base. The business failure data were derived from Dun & Bradstreet, Business Economics Division, *The Business Failure Record, 1980* (New York 1982).

The Chairman. Thank you, Mr. Liebenson.

Let me just ask a few questions here. Let us start with you, Mr. Thompson and Mr. Irving, just the two of you.

The unions in the *Bildisco* case urged that the Supreme Court apply all the notice-and-bargaining requirements of section 8(d) of the National Labor Relations Act. The unions further argued, as I understand it, that the NLRB should play a role in determining whether the employer fulfilled the requirements of the National Labor Relations Act. From your long experience, in both your cases, as practitioners in this field—and in your case, Mr. Irving, as former general counsel—do you see this recommendation by the unions as a practical recommendation?

Mr. Thompson. I do not think it is practical at all. I think once you inject the National Labor Relations Board into any form of the bankruptcy procedure, you are very likely to have all kinds of complications to arise which would defeat entirely the whole purpose of especially chapter 11.

The Chairman. Would the involvement of the National Labor Relations Board actually be too time-consuming in the sense of jeopardizing a reorganization?

Mr. Thompson. By normal National Labor Relations Board standards of time, it certainly would. Now, I suppose you could find a way—I am not sure—to expedite National Labor Relations Board proceedings. But I think to inject that agency into any aspect of bankruptcy proceedings would be the death knell of the whole concept of chapter 11. The things that are so immediate there are objective balancing of equities of all kinds, not just organized labor and management. Speed is of the utmost importance. You have so many considerations that the National Labor Relations Board simply is not equipped to deal with, I think you would find, as you normally find, the NLRB applying its old standard doctrines to something that just does not fit.

The Chairman. Mr. Irving?

Mr. Irving. Senator Hatch, it is interesting that a unanimous Supreme Court on that very point rejected the proposition that the section 8(d) notice requirement should apply in chapter 11 contract rejection situations. A unanimous court agreed that those time limits should not apply, and indeed the National Labor Relations Board itself took the position that the notice requirements should not apply. I agree with Mr. Thompson, that this would just further complicate an already complicated procedure.

The Chairman. So you both are in agreement on that particular issue?

Mr. Irving. We are in agreement, and furthermore I would say I agree with Mr. Thompson that it depends on which side of the fence you are on. If you are organized labor, you would like to see them in the picture in one way or another, because it will take more time and it will confuse things, and it will mean two separate and independent institutions dealing with the same problem. From a business standpoint, it makes no practical sense to inject the Board into anything after the chapter 11 filing.

The Chairman. Maybe the real question is, do the NLRB procedures, as they are presently implemented, allow for a party to engage in dilatory tactics so as to really jeopardize the reorganization or even compromise the need to implement prompt financial approaches to save the distressed company?

Mr. IRVING. I think the answer to that is yes. The Board's procedures are not geared for that, and judging from how long it takes other kinds of cases that do not involve chapter 11 employers, it is untenable to think that the debtor must await the outcome of any Board proceeding before the debtor would have the right to set a labor contract aside.

The CHAIRMAN. Let me ask all three of you this. The union representatives have testified that they are concerned with the bankruptcy court's having ultimate jurisdiction in these matters, as far as the initial instigation of chapter 11 proceedings and requests for unilateral abrogation of the collective-bargaining agreement or even a rejection of the collective-bargaining agreement, assuming that the nine to zero part of the decision is done away with.

Do you folks representing business think that the bankruptcy court has enough expertise to pass on whether or not the parties are negotiating in good faith?

Mr. LIEBENSON. I would doubt it. As you know, there are many very large law firms that specialize in the field of labor relations. They must follow decisions on a day-to-day basis in order to advise clients. I would doubt that very many judges in the bankruptcy court have that kind of expertise available to them on a daily basis. I cannot see how they can make a determination of bargaining in good faith, and going back to all the cases that have gone on over the years and come up with a decision in a particular case, especially when there are conflicting opinions.

Mr. IRVING. It would depend much upon what the legislative history showed. If the words "good faith" were used, and the legislative history indicated that the bankruptcy judge was required to be a one-person Labor Board and apply Labor Board precedents—and even the Labor Board has difficulty deciding good-faith bargaining cases—then I think that would be unworkable. If, on the other hand, the kind of good-faith determination that a bankruptcy court would make is the kind of determination that the Supreme Court called for in *Bildisco,* I do not think it necessarily would be unworkable. The Court, in *Bildisco,* said that in making a determination about what kind of bargaining has gone on, it is not up to the bankruptcy court to make all of the intricate kinds of decisions about whether there really is an impasse in bargaining; that is, the kinds of decisions the Labor Board makes. Bankruptcy courts make a much more practical kind of review of what has happened—what the debtor's needs are, the kind of offer that the debtor has made to the union—to see whether in essence the parties are unable to agree. That should satisfy the good-faith bargaining requirement. Again, it has more to do with what goes into the legislative history than the specific use of the term "good-faith" bargaining.

Mr. THOMPSON. I would interpret the present *Bildisco* standard to be far different from the present NLRB standard for good-faith bargaining. I think the present standard in *Bildisco* is the correct standard for the bankruptcy proceeding. That is, that the judge should simply determine that some effort has been made, a reasonable effort has been made, to accommodate the collective-bargaining agreement before it is abrogated.

I think bankruptcy judges are fully capable of making that determination. If your question was what I understood it to be—and that is, are they capable of making NLRB-type good-faith bargaining determinations—I would say no.

The **Chairman.** Mr. Thompson, you note in your statement that the bankruptcy court itself must ultimately rule on whether the labor contract must be assumed or rejected. If the contract is ordered assumed, then the employees have a priority claim for lost benefits, as I understand it; am I correct at that point?

Mr. **Thompson.** Yes, sir.

The **Chairman.** In other words, the employees have a remedy for a unilateral rejection that is ultimately rejected by the bankruptcy court; is that correct?

Mr. **Thompson.** They definitely have a remedy, as do other creditors, I suppose. They have a preferential remedy which the court built in, which I think has been generally recognized, and I think that should satisfy most of the concerns that have been expressed here earlier today. The concern that I heard expressed was that the bankruptcy laws would be manipulated in order to get out from under union contracts or in order to do the union in or whatever. I think what has been said here—that is, that employers just do not rush into bankruptcy, and they do not even rush into bankruptcy to get out from under the onerous conditions of a union contract unless they feel that they absolutely have to—there is that safety valve, as you have suggested: that if they are wrong in their determination that they are entitled to go into chapter 11, there are remedies that are available.

Those kinds of remedies can be identified, those kinds of remedies can be pursued. They are pursued every day in backpay cases under the NLRA and under the equal employment laws and so forth.

The **Chairman.** But does not this remedy carry the seeds of jeopardizing the entire reorganization? Suppose that upon unilateral rejection, employees exercise their right to strike. The employer hires replacements and he continues his business. Then the bankruptcy has decided or is confronted with the issue of whether to approve the unilateral rejection. If the court disapproves the rejection, then the debtor employer faces the prospect of rehiring all of the striking workers, giving them backpay and, if necessary, discharging the replacements.

Mr. **Thompson.** Yes, sir, I think what you just said is a terrific disincentive to an employer going into this whole process carelessly or without serious need.

The **Chairman.** Is it not likely that the bankruptcy court will find this scenario so inimical to the debtor's rehabilitation that the court will have no choice other than to approve the rejection?

Mr. **Thompson.** I do not think that a court would necessarily find that; it may in some instances, it may not in others. It seems to me, the balancing-of-the-equities test puts the court in a pretty good position to make that determination with good judgment.

The **Chairman.** Why isn't the right to unilateral rejection actually destructive of the collective bargaining relationship? After all, isn't the collective bargaining contract fundamentally different from a regular commercial contract for goods, services, or the use of land, in that the collective bargaining contract establishes, in the words of Justice Douglas "a system of industrial self-government"?

To go back to my original question. Is the right to unilateral rejection destructive of the collective bargaining relationship?

Mr. THOMPSON. I do not think it is, the way the *Bildisco* case was decided, because the obligation to bargain remains. The rights of employees under the National Labor Relations Act remained, including the right to strike and so forth. I seldom have found myself in accord with that great Justice Douglas. He had a wonderful way of coining a phrase, but I am not sure what he means by "a system of industrial self-government." It is a wonderful-sounding phrase, but I am not at all sure what it means.

I think somebody—and I believe Senator Grassley expressed this same concern earlier—ought to speak up for the 80 percent of the working people in the United States who are not covered by collective bargaining agreements and most of them by choice. What the unions are seeking here, with their mild and meek presentations, as though they were the sweetest fellows in the words—and I am sure you have sat across the bargaining table from one of those fellows and know how they are when they are on the up side of things.

It's always, "You do as I say," when they are on the up side, and it's always, "Let's compromise," when they are on the down side. And that is where they are now. That is the reason they are willing to come in and talk with you all night, because *Bildisco* is something that they find distasteful, and they do not know any other way to do it. We saw what they could do with the House of Representatives. It was so fast, nobody even knew what was going on, even the Representatives themselves.

Let me go back to my point. That is that 80 percent of the working people in this country do not belong to unions, are not represented by unions, and most of them do not desire to be represented by unions. Why should they be given second choice or second seat in a system of bankruptcy such as you have here. All we are talking about is the 20 percent of the working people in this country who are covered by collective bargaining agreements; and of those 20 percent, you could not conceivably be talking about less than some infinitesimal amount because of the few bankruptcies compared to the number of businesses.

But here, the labor unions come in, profess to speak for all working people, seek preferences for their members only, and talk about justice. If you are going to formulate any rules other than *Bildisco*, they ought to apply to everybody. They ought to apply to every worker in a business. And I think they ought to apply to every creditor of a business, because those creditors are employers also, by and large, and they have people who depend on their businesses for survival as well. If you start that domino going, you will knock over the whole system of business in this country.

The CHAIRMAN. A lot of these businesses are both union and nonunion.

Mr. THOMPSON. Of course. All businesses that have any unions are both union and nonunion.

The **Chairman**. I am talking about from an employee standpoint, a general employee's standpoint. A lot of them are. So when you get into these particular problems, if you give a preferential right to only the union employees and ignore the rights of the nonunion employees, that is a real problem.

Mr. **Thompson**. That is what the House of Representatives just passed.

The **Chairman**. I understand that. I do not want what the House of Representatives has passed.

Mr. **Thompson**. We do not either.

Mr. **Irving**. Senator, the *Bildisco* decision already gives labor contracts preference. It is important to make that point clear. The *Bildisco* decision clearly gives preference to union contracts.

The **Chairman**. I was trying to make that point.

Mr. **Irving**. *Bildisco* says that union contracts are not contracts for widgets.

The **Chairman**. I was trying to make that point, that *Bildisco* is between the *REA* standard and the other——

Mr. **Irving**. *Bildisco* clearly gives preference to labor contracts and says because they are a special kind of contract, they have to be looked at very carefully. It is for that reason the Court rejected the "strict business necessity" for labor contracts; and applied the "balancing-of-the-equities" standard.

The **Chairman**. You are both saying to these committees before whom you are today that *Bildisco* gives a preference to union collective bargaining arrangements——

Mr. **Irving**. That is right, and the *REA* standard gives them immunity.

The **Chairman** [continuing]. Even over the rights of nonunion employees in the same business? You are both saying that?

Mr. **Thompson**. That is correct, Senator. In my State of South Carolina, 94 percent of the people who work for a living do not belong to unions. In your State of Utah, it is probably about the same. Those are the people who are being disadvantaged by what the House of Representatives did and what any further preference to union contracts would do by legislation.

The **Chairman**. I ask you the same question I asked others, Mr. Liebenson.

Mr. **Liebenson**. Just as a matter of record, the bankruptcy court records indicate that the small firms that are going into bankruptcy are 15 to 20 years old. Normally 9 out of 10 firms go out of business within the first 10 years.

The **Chairman**. That characteristically has been the rule, so it is not just these times.

Mr. **Liebenson**. Those people we are looking at, as having gone into bankruptcy, are the survivors that have gone over that 10-year period and have built up a valuable business. In addition, along with that are the family owned businesses that have gone on for two or three generations. They are very reluctant, and they will do everything they can to fight going into bankruptcy courts. They have built up chains of suppliers which they do not want to destroy, because it has taken them a long period of time to build a structure of people who are suppliers, the sales force, and the distributors of their products.

This one factor of labor relations is, in many cases, not the major reason for their filing chapter 11.

The CHAIRMAN. I understand. The thing that is bothering me is that I do not want the House bill either. I think it is a one-sided approach to a very complex and difficult set of problems. It is interesting, we passed out of the Judiciary Committee that Senator Thurmond chairs one of the most sweeping Criminal Code reforms in the history of this country. I think the vote was 91 to 1. The very same people who, within an hour after the Supreme Court decision, were willing to reverse *Bildisco* and reverse it, not in the best interest of every creditor concerned but just in the best interest of themselves or their constituents or supporters. Within an hour, they called the Criminal Code Reform bill—that a bipartisan group over here in the Senate, that Senator Thurmond and I worked so hard on—"dead on arrival." Within a matter of hours, they had a bill to overrule *Bildisco*, even though *Bildisco* is a compromise approach by the Supreme Court between the *REA* standard and the business-judgment standard. So it bothers me a lot.

Let me just also mention what bothers me a little bit about your testimony, Mr. Thompson. Maybe you can clarify the chamber's position. Are you telling us that the chamber opposes this bill—and I am talking about the bill that we would like to have in the Senate—with consumer finance amendments, 85 article III judges, 15 of them circuit courts of appeal judges, clarification of bankruptcy jurisdiction, including 227 article I bankruptcy judges, which would overcome the marathon decision in our opinion and resolve the problems regarding bankruptcy, assistance for grain elevators and, I might add, shopping centers, if we could arrive at a reasonable provision which is far short of the House bill. It would be a compromise position somewhere between the House bill and *Bildisco*. Are you saying that the chamber would not want this bill under any circumstances, if there is any change to *Bildisco*?

Mr. THOMPSON. We favor all the provisions you have just described, and we are on record as favoring them. We have worked with the Congress very carefully and extensively to develop that legislation.

What we did in our executive committee is, we determined that as far as we are concerned, the labor issue is the priority issue among all those that you have mentioned. That does not mean that would oppose the legislation if it had any labor provision in it whatsoever.

The CHAIRMAN. Are you willing to sit down and see if we can work out a compromise? I will be honest with you, the compromise we worked out was very difficult. It had not been run by everybody, but it finally was. When we finally ran it by everybody, the AFL-CIO did not want it, you did not want it, and I presume there are some others who did not want it. You have every right to do that, and I cannot disagree with either side what they really want. The question is, can we resolve this, because I seriously question whether it can be resolved.

If we could not do it with that agreement, which contained a removal of the unilateral rejection aspect, but I think a reasonable preservation of the balancing-of-the-equities standard—true, somewhat modified—but I think reasonable enough to protect companies who could make the case under the balancing-of-the-equities standard that they literally should have a rejection. That has been rejected now by everybody. So I presume the AFL–CIO will not agree to something that is a little more favorable to your side than that. You could not agree with that or something a little less favorable than that agreement. How in the world are we going to get this matter resolved? Can you give me some suggestions?

Mr. THOMPSON. I do not know, senator. As far as we are concerned, we are satisfied with *Bildisco*.

The CHAIRMAN. But you are not satisfied with the loss of all these other matters that almost anybody would have to agree were important for consumer faith in the judicial system in this country, the bankruptcy system in this country, the bankruptcy judge system in this country, the assistance for grain elevators and shopping centers—all of which is important and pretty much agreed to.

It seems to me what you are saying is, The unions, with their friends in Congress, came in and they changed it totally in their favor over in the House. There may not be any way of compromising this beyond *Bildisco* in the Senate. Therefore, we are in an impasse, where we are not going to resolve all these other problems because we cannot resolve the *Bildisco* problem.

Mr. THOMPSON. You are in a better position to know that than I am, because I was not involved in your negotiations with the unions.

The CHAIRMAN. You were in the end, when it was finally done.

Mr. THOMPSON. I had a telephone conversation with you, I believe.

The CHAIRMAN. You were involved. Your people were there.

Mr. THOMPSON. I was not involved, and I cannot predict, therefore, what kind of a compromise could be struck or whether one could be struck.

The CHAIRMAN. You are willing to work on one?

Mr. THOMPSON. We are certainly willing to work on one, but I cannot say to you that I here and now know of a compromise that would be acceptable, even to my people much less the unions.

The CHAIRMAN. That is what I see. If the compromise we struck was not acceptable—and I can see why you feel it is not; I can see why you might feel questions about it, Mr. Irving; why you, Mr. Liebenson, and other business community people—because it was a compromise between *Bildisco* and *REA*. If that does not make it, and the AFL–CIO is against that, how in the world are we ever going to get this resolved.

Mr. IRVING. The union "compromise" first appears to be aimed at eliminating unilateral rejection. The Congress may decide that unilateral rejection is not the best public policy and may decide to eliminate it. But then unions say that they want to change the rejection test too; they want to legislate the *REA* test. I have heard so much about *REA Express* in the last couple of months that when I close my eyes at night, I can see the *REA Express* race in front of my eyes.

It is interesting you look at the *REA Express* opinion of the second circuit that it contemplates unilateral rejection. It is only that portion of the *REA* opinion dealing with the test for rejection that organized labor focuses on. But if you look on page 171 of the opinion, the court says, "We do not interpret this exception as mandating that a new employer, pending negotiation of a new agreement with the union, must adhere unqualifiedly to the terms of its predecessor's agreement. Where its employees are represented, as here, by collective bargaining representatives, it is obligated merely to give reasonable notice of its proposed terms and to negotiate in good faith for a reasonable length of time before putting them into effect."

If REA is so correct, then maybe the unilateral abrogation part of REA is correct, too. I think the point is that union compromisers want to compromise on unilateral rejection, and then they want to compromise on the rejection standard, too. Organized labor wants to legislate the standard which it urged on the Supreme Court in *Bildisco* and which the Court unanimously rejected.

The CHAIRMAN. It is apparent that they tried to get everything in the House bill, and they have. The question is: What can we in the Senate do when we feel so strongly about this legislation, and we think the other aspects of the legislation may even outweigh some of the problems with *Bildisco* in the long-term interest of this country. I think you probably may agree with that privately yourselves. But what can we do?

Let me ask you this, Mr. Thompson. Let us say that the business community gave up unilateral rejection or unilateral abrogation of the collective-bargaining agreement but kept the rest of the decision, the 5 to 4 decision, would that be acceptable to the chamber.

Mr. THOMPSON. No, sir. I would be glad to discuss with you and with my principals at the chamber some ramification of that, where you have some protection against dilatory tactics on the part of labor unions who, even this morning, admitted that they are not perfect and that they do have some people who might engage in that sort of practice. I think the thing that concerns us the most about giving up, as you say, unilateral abrogation is the fact that it opens up the very thing that you need in a chapter 11 proceeding to delay; that is, you need speed. If you are going to save a business, you have to go in and reorganize it quickly and get the principal people involved quickly to agree to it or it does not work. If you do not let the business take everything that is a problem—and the labor contract, in this instance, is a contract like any other—and the bankruptcy experts all tell me, that you cannot expect the chapter 11 proceeding to be successful.

If there is some way you can have a really quick determination, rather than just a unilateral abrogation, without every safeguard in the world built into it, we certainly would be willing to consider it and discuss it with you. But I would be reluctant to say, even now, that we would be agreeable to it. I know that is what you tried to do in this language you came up with. But there are so many ways that people in our profession can find to defeat the most studious effort at preventing delay that I am just reluctant to say you could do it.

I think the best way to go would be to go ahead and leave the unilateral abrogation in there but put an expedited proceeding in behind it so that there is no motive on the part of the unions to delay it, and you might get a better form of justice. That might be a better way to go.

Senator THURMOND. I noticed Mr. Liebenson, in the last paragraph, mentioned the following: "We would find acceptable an amendment requiring some form of approval, under appropriate conditions, by an impartial decisionmaker of any labor contract modifications made after the filing of a petition for bankruptcy." I was just wondering if you could elaborate on that point. If you were trying to get an agreement on this matter, what do you think would be reasonable?

Mr. LIEBENSON. I assume that there is before the bankruptcy judge a reorganization plan. Part of that plan might be the modification of the labor agreement on a temporary basis or for whatever period of time. But whatever they need, they need some form of agreement, including a labor agreement, before they can go back to the banks, go back to other people who can raise capital, to help them to survive and preserve those jobs.

What I am really relating to is either have a labor advisory group to the judges or possibly someone that can actually handle and recommend to the judges on those labor issues. But they would be part of that bankruptcy court system.

Senator THURMOND. Let me mention my views on this situation. We are at an impasse right now. You know, if we had our way in the Senate and did not have to go over to the House, it would be easy. If they had their way, it would be easy for them, I guess. But we have two bodies here, and we get no law at all unless both agree. Maybe we should not agree. On the other hand, if we can agree, we need to do something about these bankruptcy issues. There are a lot of other good things in the bill that the Senate passed and that the House has agreed to. But the labor provision put in by the House is what is causing the trouble.

They took out our judges, too. We do not know whether it is possible to keep what the House sent over here and put the judges back in and reach some reasonable compromise on this labor matter. If we can, OK; if we cannot, we will just have to agree to disagree. I am wondering, however, if you gentlemen feel there is some chance that we could reach some agreement and go forward on these bankruptcy matters which ought to be settled in some way. If not, we have to eliminate the labor provision, the judges provision, and other things. Now, how far are you willing to go?

Mr. IRVING. We are willing to talk. We are willing to meet. We are willing to consider any proposals. What we do not want to walk out with is one-eighth of a pie, and that is about what we have been invited to do: Come in, sit down, be reasonable, and you can have one little slice; then maybe organized labor will go back over to the House and return to House-Senate conference where it will try to get the remaining slice, too. One slice of a whole pie is nowhere near enough to interest the business community in the least.

Senator THURMOND. Mr. Thompson, do you see any chance that we can agree? Do you see any area of agreement that might be reasonable? Do you think you could suggest some way we might be able to get together?

Mr. THOMPSON. Senator, the only thing I can see that might even be a possibility—and I have grave doubts that the unions would find it acceptable—would be to keep unilateral abrogation in but put an expedited approval system in place so that within a period of, say, 30 days, a judge must rule on whether the abrogation of the contract is valid or not. Then let the parties have that 30 days' pressure on them to find a way to agree on how they can live through this problem or let the judge make his ruling.

If the contract is abrogated for a 30-day period, I guarantee you, there will be nobody dragging his feet. I would even be willing to say go 60 days, like Mr. Presser said, as long as the contract is abrogated and the pressure is on them. The thing that I do not want to see happen is that the employer has to go hat in hand to the union to get them to agree or has to go hat in hand to a judge to get him to agree.

The CHAIRMAN. Under the agreement to which we tried to get everybody to agree, all the employer had to do was make a good-faith effort to submit an approach to the union that he could live with. Once he made that effort, he could unilaterally——

Mr. THOMPSON. But you changed the standard in that, too, and we object to that.

The CHAIRMAN. That is true. I do not think it was a significant change; you do.

Mr. THOMPSON. You also have a series of steps on timing.

Senator THURMOND. Mr. Thompson, this is what I want. Senator Hatch has kindly agreed—and he has shown a lot of patience in this matter—to try to see what we can do. We may not be able to do anything, but are you gentlemen willing to meet with him and with representatives of the unions to see if you can reach an agreement? If you cannot, we know where we stand; but if you can, we can go forward here and get this matter settled. Are you willing to meet with Senator Hatch on this basis?

Mr. THOMPSON. Certainly.

Senator THURMOND. Are you willing to meet with him?

Mr. LIEBENSON. Yes.

Senator THURMOND. Mr. Irving, are you willing to meet with him?

Mr. IRVING. Yes, sir.

Senator THURMOND. All right, Mr. Hatch, there is your group. [Laughter.]

The CHAIRMAN. I think I have been through this before. [Laughter.]

Senator Nickles.

Senator NICKLES. Thank you, Mr. Chairman. I have a couple of questions to follow up on Senator Thurmond's. Mr. Irving, correct me if I am wrong, and also Mr. Liebenson. I sense that you are both willing to compromise possibly on the abrogation question, or that you would be willing to have court-approved abrogation as long as you could have it very timely?

Mr. LIEBENSON. We have made that concession.

Mr. IRVING. The greatest fear is that this process will not be a truly expedited process. If it really is an expedited process, if it is not going to take much time for appeals on top of appeals and if the whole process takes 60, instead of 180 days, and the debtor can make plans, then that would be more workable. An expedited process must be one that truly works.

Mr. THOMPSON. The true protection against that is to let the abrogation take place, and then let the parties talk, and then let the court do all the delaying they want to, as long as the abrogation continues. That seems to me to be the only way to keep the pressure on and avoid the costly and maybe fatal delays that would follow.

Senator NICKLES. Under the Hatch compromise, this was the procedure, and there were two or three steps that were involved. Mr. Irving, you are pretty familiar with that. Can you tell me how many days that was strung out?

Mr. IRVING. It was a total of about 60 days, as I recall. The compromise had very stringent sanctions in the event the bankruptcy court did not issue its decision within the allotted timeframe. The debtor could apply to an appellate court, be it a district court or a court of appeals, and that reviewing court would be required to issue an order requiring the bankruptcy judge to issue a decision within an additional 5 days. There also were stringent time requirements on appeals: A decision within 15 days for any appellate court.

The CHAIRMAN. On each stage?

Mr. IRVING. On any stage of appeal.

Senator NICKLES. Assuming a filing, how many days could that be strung out before an employer would be able to——

Mr. IRVING. I think maybe all the way to the Supreme Court, a maximum of perhaps 85 days.

Senator NICKLES. Eight-five days?

Mr. IRVING. I would have to go back and count the time periods. And, judges would have had discretion to add another 7 days here and there, but it was basically a 2- to 3-month process for rejection of a labor contract.

Senator NICKLES. First, Mr. Irving, does that seem acceptable to you? Is that tight enough on the abrogation question?

Mr. IRVING. Yes; if it truly works. But do not forget, on the one hand, we are addressing how long it is going to take for the judge to make his decision. On the other hand, organized labor wants to tinker with the rejection standard. There may be so many requirements that it will be very difficult for the debtor to prove its case. If so, then at the end of the rejection procedure, labor contracts will be insulated from rejection. The debtor will not be able to reject the contract in any event.

Mr. LIEBENSON. I understand there is a tremendous backlog in the bankruptcy courts today. I think we should hear from the administrator of the court system and get their recommendations on how long it might take to approve or disapprove the provisions. We do not have the facts in front of us, and we are really dealing in an area in which I am not knowledgeable enough to even make a guess at what that time should be. It could well be 15 days, 30 days, 90 days, or whatever the administrators determine they could do.

Senator NICKLES. Mr. Thompson, you did not agree with the so-called Hatch compromise. Neither did AFL-CIO. I asked them to submit their objections to that language. Would you submit your objections to it as well?

Mr. THOMPSON. Yes, sir, we would like to.

Senator NICKLES. I appreciate that.

One final question. Mr. Thompson, I have heard from different groups that organized labor is holding this thing hostage because they are insisting that this language be in it to repeal the *Bildisco* case. I have also heard that the Chamber is holding it hostage because they do not want it to pass unless it is out of there. Would you care to address who is holding this hostage? A lot of us—Senator Thurmond, Senator Hatch—want to see this bankruptcy——

Mr. THOMPSON. If it were not for the labor section of this bill whi~~ch th~~e labor unions put forth and we simply opposed, the bill, I think, would have already been passed and would be law. Now, I may be wrong there. I think Senator Thurmond feels that the House has agreed to most of the provisions of the bankruptcy bills that are pending.

To say that we are holding something hostage because we object to something being tacked on to it I think is rather ludicrous. I, for sure, would say that the unions are holding the bankruptcy bill hostage in order to get their labor provisions and maybe for all kinds of other reasons, for all I know. They have admitted this morning that they were not perfect. It is the first time I have ever heard them admit that, Senator Hatch. But they are not above holding something hostage for reasons other than those expressed.

Senator NICKLES. Is there any other occasion any of you can think of that had a unanimous Supreme Court decision which Congress has overturned this rapidly?

Mr. THOMPSON. I do not ever recall it. Certainly the way the House acted, I do not recall anything that would compare to that in the history of this country.

Mr. IRVING. I know of none, certainly.

Senator NICKLES. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. It has been requested that I bring you people back at 2 o'clock, but I really think that would be an injustice to you under the circumstances. You have been here since 9 o'clock this morning—actually 9:30 a.m., and I know a lot of you were here before then. Would it be all right, if you are willing to come back, I would like you to if you can, but a couple of our Senators have indicated they would like to ask additional questions. But if you are not willing to come back, I will keep the record open for a submission of questions to you, and I would like the answers back by Friday of this week.

Mr. IRVING. Whatever is your pleasure. We would just as soon answer anybody's questions face to face, here and now, or at 2 o'clock this afternoon, or 4 o'clock this afternoon.

The CHAIRMAN. Is that all right with you, Mr. Thompson?

Mr. THOMPSON. Yes, sir.

Senator THURMOND. While you are here, if you can come back at 2 p.m., it would satisfy some Democrat Senators.

The CHAIRMAN. It would give our colleagues a chance, but I feel somewhat guilty about keeping you because of the length of these hearings. What we will do is to come back at 2 p.m. You people will be up on the table again, and we will give our colleagues, whoever comes, an opportunity to question you. We will recess until then.

[Whereupon, at 1 p.m., the committee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. We will resume.

Senator Biden, you may proceed.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Mr. Chairman, I do not want to speak to the people. I want to speak on the record to you.

I want to make it very clear to you that I sincerely and deeply regret and resent the fact that you would not withhold this hearing from proceeding for an hour and 45 minutes while we attended the funeral of a colleague. The entire U.S. Senate saw fit to do that, the entire U.S. Senate delayed going in today to do that, and I understand there were requests made that you do that. We did it in the Budget Committee, which is marking up the Federal budget, and I am sure not one of these gentlemen would have minded being here another 1½ hours today. If they would mind it, I would think even less of them than maybe I do.

I think it is outrageous. In 12 years, I have never known any Senator to refuse to extend the courtesy to another Senator and a series of Senators asking for something like this. I just want it on the record, and I want to tell you, I had better stop talking about it because I do not feel very good about it.

The CHAIRMAN. Let me say this. We apologize to you, Senator, and to all Senators who feel the same way. I certainly did not mean to irritate you or anybody else for that matter. I am just trying to do my job and also accommodate other people as well.

Senator BIDEN. I think it denigrates the institution.

The CHAIRMAN. I think you are right. In retrospect, I think you are right. I have to admit, that did not affect me at the time because I wanted it in my job. I had all these people here. We have until the end of this month to resolve this problem. I would have liked to have been there, too, and generally am. So I take the criticism and accept it and admit that you are right. I apologize personally to you and to other Senators. I hope that the apology will be accepted. I apologize to you formally.

Senator BIDEN. I accept the apology.

The CHAIRMAN. Thank you so much.

We have brought all these people back for your benefit, and to the extent you want any of the others back, I will bring them back and hold special hearings for them as well. Go ahead.

By the way, I do not recall anybody asking me to defer this, but maybe they did through staff or some other way. I just feel that when you have a hearing like this set up and all these people coming in, you have to do the best you can. But to the extent I used bad judgment, I apologize.

Senator BIDEN. I apologize if in fact it was not true. I was told by staff specifically that Senator DeConcini asked if you would.

The CHAIRMAN. He did ask that we defer some of these people until afterwards, and I just felt I had to go ahead because of the stack up that we have here. I want to finish this today, and I think you know as well as anybody that my schedule is as bad as, if not worse than, that of most people around here. I am just trying to do the job I can.

It was no great thing for me to be here today, and frankly, I do not think it was any great thing for all these people from out of town. I know a number of them, and perhaps I will have have to say, I have to agree. You are right in this instance, and I apologize.

STATEMENT OF ROBERT T. THOMPSON, MARK A. DE BERNARDO, F.M. LUNNIE, JR., JOHN S. IRVING, HERBERT LIEBENSON, AND EUGENE GRANOFF (RESUMED)

Senator **Biden**. Gentlemen, you represent a broad spectrum of American business, big and small. Is it the position of the U.S. Chamber of Commerce that an efficient and certain bankruptcy system is an essential element in the conduct of business and commerce in this country?

Mr. **Thompson**. Yes, sir.

Senator **Biden**. Is it similarly your position and that of the chamber that collective bargaining, the National Labor Relations Act, and the resulting labor/management contracts are essential to prevent industrial strife and economic disaster in this country?

Mr. **Thompson**. Yes, sir.

Senator **Biden**. If the bankruptcy system is essential to trade and commerce, and if collective bargaining agreements are essential to trade and commerce, then should not these two policies be accommodated to ensure that neither undermines the other?

Mr. **Thompson**. Yes, sir.

Senator **Biden**. I have not had a chance to listen to but I did read the bulk of your prepared statement. I do not know what you have said beyond your prepared statement. I was a little bit disappointed in the position that I understand you are taking today. That is, it has been my understanding that representatives of the chamber, along with representatives of other business groups, have participated in negotiations heretofore with representatives of labor and the Senate staffs in an attempt to achieve a compromise that both sides can live with. Am I mistaken? Have you been participating in negotiations up to now?

Mr. **Thompson**. No, sir.

Senator **Biden**. So that these discussions that the staff has been having with various parties, the chamber has not been a party to them?

Mr. **Thompson**. The chamber has not been a party to the negotiations. I cannot say that no one connected with the chamber at any time has ever discussed this subject with staff or Senators. Probably they have. But I, personally, have not, and I am the chairman of the labor committee and chairman of the executive committee, and I think I am certainly one of the principal spokesmen for the chamber on this subject. I do not fault anyone for that. It is just simply in response to your question, I have to say no, I was not involved.

Senator **Biden**. No, it is not a pejorative question. I just wanted to get it straight, whether or not negotiations that had been underway were ones in which you participated. I agree that you would be the key person for the chamber, if such a negotiation was underway.

Let me ask you another question. We were under the impression, many of us, that everyone was fairly close to agreement here. After reading the statement, your position is clear, concise and precise.

Mr. THOMPSON. We tried to make it so.

Senator BIDEN. I understand that, and we commend you for your brevity, which is "No."

Mr. THOMPSON. In some circles it is "Nyet."

Senator BIDEN. At least it is not "Nyet" yet.

I would like to raise my voice with others in the committees who, I am told prior to my being here, on both sides of the aisle, have suggested that negotiations are essential here, that there is a need for there to be something between "Nyet" and "yes."

Let us talk about the issue of what amounts to a unilateral rejection of a collective bargaining agreement. Is it your opinion that unilateral rejection of collective bargaining agreements by either side is not a policy—forgetting bankruptcy now, after a collective bargaining agreement has been entered into, I assume it is a change of position that neither side of that agreement should be able to unilaterally renounce the agreement.

Mr. THOMPSON. Yes, that is correct. We are supportive of the National Labor Relations Act, which provides to that effect, except to the extent of a company actually going out of business and liquidating or something like that. I think the difference in that principle and the principle of bankruptcy versus labor law is that you have a broader spectrum in bankruptcy law, and you have interests that have to be balanced, and labor is only one of those interests. We feel that the Supreme Court, in the *Bildisco* case, did balance those interests properly.

With regard to abrogation, it is not just applicable to labor agreements. In fact, labor agreements have somewhat of a preference in the system. But it is all agreements. Our feeling is that all agreements ought to be treated the same. If you are going to have a system where abrogation is a part of it, then labor agreements ought to fit into it. If that causes too much strain on the system of collective bargaining, it seems to me there is room for some system of early review of the decision itself, the filing for chapter 11, which could be as foolproof as you could make something but put the burden on the parties who otherwise would have an incentive to delay. That is a review after abrogation, and put a time certain on that, which is not in the law at this time.

Senator BIDEN. Let me try to understand that. You suggest that assuming it becomes evident that the company is heading toward chapter 11 status, you are suggesting that prior to such a filing what should happen? You lost me there.

Mr. THOMPSON. What I have said is, I think whatever scheme you come up with—and in 1978, Congress, in its wisdom, passed the current bankruptcy law, which permits abrogation of agreements when you file for chapter 11. What I said is, if that puts too much of a strain on the collective bargaining system—which I cannot foresee, but others have predicted that—I think perhaps a solution to that—You were saying, we have to find some ground in between—would be some system of early review of the abrogation of the agreement and the act of filing.

Senator **Biden**. That is what I mean by "early review." Do you mean prior to the filing?

Mr. **Thompson**. No, I am speaking now of after the filing. The point I would like to make to you, which I made to the senators before lunch, is I think the only way to make any threshold treatment of collective bargaining agreements work in a chapter 11 context is to allow the abrogation, if you are going to allow abrogation of anything, and then put the burden on the parties to find a way out of the predicament, rather than put the burden on the parties before the abrogation and give the incentive to the labor unions to prolong the negotiations and be more rigid in their positions. Then I think the protection you could put in there would be some guarantee of an early review of the basic decisions of filing chapter 11, whether they meet the proper test of balancing the equities and so forth and whether the proceeding is valid in itself, rather than allowing the unilateral decision to drag on for months and months.

Senator **Biden**. Would not another way to do that be to provide for what we were talking about earlier, an expedited procedure where the bankruptcy court would make a judgment prior to the abrogation, but expedited so that labor in this case, which is your concern, could not drag out, could not prolong, could not use as a bludgeon the process?

Mr. **Thompson**. From experience, I think if you put it the other way around—put the abrogation first and then the expedited proceeding second—you are more likely to get an expedited prooeeding.

Senator **Biden**. But the central point you are making is that the timeframe has to be a narrow one?

Mr. **Thompson**. Yes.

Senator **Biden**. You do not think, I assume, that bankruptcy reorganizations should be used as a ploy or a negotiating weapon for solvent companies who merely want to break the union contract hoping to negotiate a better one? You are not suggesting that?

Mr. **Thompson**. Absolutely not.

Senator **Biden**. So, under what circumstances do you think it would be unfair for a company that has petitioned for reorganization to reject its collective bargaining agreement? Can you give me an example? I imagine you have given examples of where the labor union would be acting in a lack of good faith, and that is the reason for your concern. You would like the abrogation then the expedited procedure. Would you acknowledge that it is at least plausible under the present Supreme Court decision for a less-than-scrupulous although solvent company to use the bankruptcy proceeding as a negotiating weapon?

Mr. **Thompson**. I think it is possible, but there are so many safeguards already in the law—and some would be criminal, if what you have said could be proved—that it is not a great danger. I cannot picture employers who are otherwise solvent using the chapter 11 provisions of the bankruptcy laws for bargaining purposes. I think it would be illegal, and I do not think they would get away with it.

Senator **Biden**. You really cannot come up with any examples? You are an imaginative fellow. I think I could think of a few, where it could be awful close. I am not being facetious.

Mr. **Thompson**. I take what you are saying to be serious. I know you have better things to do than play games with me, and me likewise. If you take the premise that I have stated, and that is that there are protections in the law and that an extreme example would be criminal, I cannot conceive of a way that an employer, unscrupulous or otherwise, would use the bankruptcy laws for bargaining purposes. That is the question you asked me. It seems to me, it would be like bringing a gun to the bargaining table and extracting an agreement out of the other side and then saying, "We had free and fair collective bargaining."

Senator **Biden**. You all know how hard it is, even under chapter 11 proceedings, to determine at what point a company is solvent or insolvent. You know how difficult it is, in terms of what bookkeeping method one used and what method of accrual. It is not, as lay persons might suggest, as clearly black and white as to when one reaches bankruptcy.

Mr. **Thompson**. I will grant you that.

Senator **Biden**. I would like for you, without pursuing this point further, to explore whether there is any possibility of any negotiating here to be done, if it makes any sense at all. One of the proposals that I have seen would require the debtor company to make an offer to labor, providing for minimal modifications in the collective bargaining agreement that would meet the business' immediate financial needs. This offer would be made before the bankruptcy court could be asked to reject the union contract. Do you have any objection to this kind of a procedure? In other words, we all say we want to keep these things out of court. We say that collective bargaining agreements, honestly arrived at, have some degree of sanctity. And we are saying that the bankruptcy provisions of the law should be able to function. What about the notion that when it is clear that a company is moving to chapter 11, it be asked to make an offer to labor, within the context of that collective bargaining agreement, that would call for modifications in the agreement designed to meet the immediate financial needs of that business, and that this offer be made before the bankruptcy court is asked to reject the contract out of hand. It is a sort of showing of good faith before you got to that point. Do you think that is a reasonable tool?

Mr. **Thompson**. There is a requirement in this scheme that is laid out in the *Bildisco* decision that the employer attempt to accommodate the labor agreement or the labor needs as a part of his good-faith effort. To go beyond that and put into the law itself language such as you have just described, with the minimal offer—which I think was a part of the so-called compromise that was reached on a late night—it seems to me to go against everything we have ever known in collective bargaining. We have a scheme of collective bargaining which is designed to put the parties in juxtaposition to one another and to let them negotiate from their own basis, whatever that might be. But it is clearly spelled out that a party does not have to make an offer, it does not have to make a concession, it does not have to——

Senator **Biden**. No, I understand that.

Mr. **Thompson**. You are suggesting, though, that we change that scheme now and, for bankruptcy purposes, require an offer. This seems to me to be going in the wrong direction.

Senator **Biden**. Well, we are changing a lot of other things. If we had not changed the law in 1978, we would not be in this spot fooling around with this legislation, would we?

Mr. **Thompson**. I do not know.

Senator **Biden**. Well, it is not as likely. Let me put it that way. It is possible but not as likely.

One of the concerns is over the timing of the bankruptcy court hearing on rejection. How much time, in your opinion, would you think would be fair if a rejection were sought by a failing business?

Mr. **Thompson**. Well, if you allow abrogation first, then I would accept the president of the Teamsters' Union's timetable of 60 days. I think 30 days ought to be enough. It seems to me, once you set the petition and the abrogation in motion, worry over time ought to be coming from the other side. I would accept almost any reasonable timetable that they would suggest. I am saying the unions now.

Senator **Biden**. Would it be fair, in your view, to accept some kind of system that would be similar to hearings on temporary restraining orders and permanent injunctions, that in one the time is very short and in the other, longer, to give an opportunity to consider all the implications of the contract rejection. Is that notion appealing to you?

Mr. **Thompson**. That is what I had in mind, especially the aspect of the TRO that is nonappealable, which means that you can get the thing decided and go on with the bankruptcy or chapter 11 without the delays that appeals might bring about, which could come later. Yes, that has a great appeal to me, once you allow the abrogation. If you are going into the injunction-type proceeding, then I think the unions ought to be the moving parties as far as injunctions are concerned. But it seems to me, you can set up a scheme which would allow for a simple hearing before the referee in bankruptcy or whatever you call them now, when you would require that he hold a hearing and make a decision within a period of time, say, 30 days. Some statutes, I think, require hearings within 10 days. I do not even object to that, as long as you put it in the position that it is in now under *Bildisco*.

Senator **Biden**. That really brings us to the question of what standard should be applied by the bankruptcy court in weighing whether or not the rejection of the collective bargaining agreement should take place. It appears that in the interest of obtaining the passage of bankruptcy reform legislation this year, some compromise is going to have to be made between the decision and the language in the House-passed bill.

Let me back up a moment and ask you whether it is important to the members of the organizations of the other gentlemen here that we have a bankruptcy bill passed. Let us start at that end. I apologize, I do not know who you represent. I know you have been through this. Just tell me, Mr. Liebenson, who you represent and whether or not you think that is important.

Mr. **Liebenson**. I represent the Small Business Legislative Council, which is made up of 82 national trade associations, which in turn represents 4.5 million small firms, and I am also president of the National Small Business Association, which has over 50,000 direct members.

Senator BIDEN. Do you think it is important to the members of your organization that a bankruptcy bill be passed?

Mr. LIEBENSON. Based on the number of small business people who file for bankruptcy, I think it is essential that a bill go through now.

Senator BIDEN. Mr. Irving?

Mr. IRVING. National Association of Manufacturers, Senator. Yes, of course, we would like to see bankruptcy legislation.

Senator BIDEN. I am not being facetious when I say this. The fact of the matter is, you have all been aware that the three of us, among others, have been trying to work out a deal on the bankruptcy court unrelated to this decision, by the way, for the past—how long has it been, Mr. Chairman? God only knows.

The CHAIRMAN. A long time.

Mr. IRVING. We do not want to see a revised bankruptcy structure include a labor provision which makes chapter 11 unavailable, that is, repeals chapter 11, for distressed employers who have burdensome union contracts.

Senator BIDEN. Burdensome union contracts that were negotiated by them?

Mr. IRVING. That is correct, as are all of the employer's contracts, including his commercial contracts which he can reject with impunity.

Senator BIDEN. I assume that when we talk about a "burdensome" contract, you are talking about the context of what the financial requirements of the company are at the time relative to the contract——

Mr. IRVING. I would suggest, Senator, that a company cannot always foresee that the Congress, for instance, is going to pass deregulation legislation to deregulate the trucking industry or deregulate the airline industry. Deregulation suddenly throws the unionized employer into competition with a host of nonunion carriers, and suddenly that employer's labor costs, which are the chief difference between himself and his competitors, may be 30 percent or 40 percent higher than his nonunion competitors servicing the same routes. That unionized employer had nothing to do with the passage by Congress of that deregulation bill.

Senator BIDEN. The only point I am trying to make is that the burdensome nature of the contract developed as a consequence of events that occurred after negotiation of the contract?

Mr. IRVING. Whether they be of the debtor's or somebody else's making.

Senator BIDEN. OK. There has been a lot of discussion in the press and elsewhere that labor is divided on this issue. Is it not true that business also is somewhat divided, or are you all in complete agreement with Mr. Thompson? Mr. Liebenson, are you in complete agreement with Mr. Thompson's approach?

Mr. LIEBENSON. Not totally.

Mr. IRVING. We are in agreement with Mr. Thompson when he says that he is willing to reach some kind of a reasonable compromise that will not result, as I said earlier, Senator, in our winning only one piece of the pie. If the negotiations are going to result in our compromising to the point where most of the pie goes to organized labor, and business winds up with one slice, that is not the kind of "compromise" we are interested in. If people want to be reasonable and they want to talk about preserving a rejection standard that will truly work, we are willing to talk, as Mr. Thompson pointed out, about procedures that will work. These procedures must eliminate the incentive for delay and be truly workable. As long as these are the objectives, I think the NAM has demonstrated that it is willing to talk.

Senator **Biden**. I think you have, too, and that is why I am pursuing it. On the issue of whether or not there will be an expedited hearing before the court rejection of a contract—the point that Mr. Thompson has been very articulate on, he suggested that, rather, the burden be the other way, and that is rejection and then an expedited procedure. Do you think it is unreasonable to suggest the opposite, to suggest expedited procedure?

Mr. **Irving**. No, I do not. We would prefer what Mr. Thompson suggests. If our feet are put to the fire, and we are told that we are either going to have the Rodino bill or some kind of a prerejection procedure, it is obvious what our choice would be: We would prefer not to have the Rodino bill.

Senator **Biden**. I am not trying to put you on the spot a lot of physicians do: Do you want to lose your left arm or your right arm? I am not asking you that. I am just trying to get a sense of whether or not it makes any sense for us on this committee or for me as the ranking member of the Judiciary Committee, one of the committees with joint jurisdiction here, to enter into long hours of negotiation to try to move something along the lines of the line of questions I was asking. You have answered my question.

I have trespassed on your time much too long, Mr. Chairman. If I may just ask two more questions before I go to the Budget Committee.

The **Chairman**. I will be happy to have you do it.

Senator **Biden**. The Budget Committee is meeting simultaneously. Two fellow members of the Budget Committee and I have an amendment calling for freezing of the entire Federal budget. It is our turn to present our proposal at 2:30 p.m. So I want to be there.

Mr. **Thompson**. I wish you luck. [Laughter.]

The **Chairman**. I had better be there, too.

Senator **Biden**. I need some luck. Democrats and Republicans are angry with us.

There are four more questions I have, and I would like to submit them to each of you in writing, if I may. One asks you to respond to a question relating to what constitutes balancing the equities that we keep talking about, and what are the needs of the debtor's and creditors' companies' employees that need to be taken into consideration in some of the things. The other is, what kind of good-faith negotiations should a debtor enter into with its employees to ensure that there is that balance between the welfare of the employees' and the company's rights and needs, at least in the short term? Would it be appropriate to ask the bankruptcy court to consider two different standards, one a very short-term emergency standard and one as part of an affirmation of a plan for reorganization, which I happen to think is a more reasonable way to deal with that, and should these standards be any different?

One or more of the proposals that I have seen allows whatever new standard is passed by Congress to apply to pending cases. What effect would such a provision have, in your opinion, if applied to pending cases? And last, it is my understanding that the officials here from Continental Airlines are going to testify that permitting any new standard to apply to cases which already have been filed would cause havoc in that litigation and in the reorganization efforts of that company. I would like to know whether or not your position would be at odds with the company that is so publicly identified with the issues involved in this hearing.

Those are the questions I have, and I thank Senator Hatch and Senator Thurmond for allowing me to go through my entire series of questions. If I get a chance to present my case up in the Budget Committee, I will be back. If I am back really soon, you will know what happened: I lost.

The CHAIRMAN. I have a couple of questions for you. Is it feasible to require the distressed businesses and the unions to negotiate about the contributions all creditors should make to save any particular business? It seems to me that negotiating over the contributions to be made by all parties at such an early phase is impractical, but am I correct on that?

Mr. IRVING. Requiring contributions from other creditors at the outset of a chapter 11 proceeding stands chapter 11 on its head. There is no way, at the outset of a chapter 11 proceeding, to divine what is going to happen at the end of the chapter 11 proceeding, particularly where at the outset there has been no creditors' committee involvement. The union is part of the creditors' committee, along with other creditors. It can take weeks or months or years in some cases for creditors' committees to agree upon contributions. To require at the outset of a chapter 11 proceeding, when the debtor is in need of setting his labor contract aside, that the debtor has to somehow discern what is ultimately going to happen at the end of the chapter 11 and then apply it to the front end, is bizarre to say the least. Indeed, it would seem that anyone suggesting such a bizarre scheme may be suggesting a procedure that totally will thwart the expedition which is needed. Such a procedure could not be expedited at all, even if it purported to contain certain time limits.

The CHAIRMAN. Mr. Thompson?

Mr. THOMPSON. I agree with that.

The CHAIRMAN. What about you, Mr. Liebenson. Do you agree?

Mr. LIEBENSON. Yes.

The CHAIRMAN. This morning, representatives of several labor unions discussed several cases in which they allege that businesses with whom they had collective-bargaining agreements deliberately used chapter 11 to escape union contracts. Let us start with you, Mr. Thompson. I would like you to comment on these allegations. And further, are you aware of whether employees are generally permitted to vote in the management's final offer prior to applying to reject the collective bargaining agreement?

Mr. THOMPSON. To answer your second question first, if I understand it correctly, the voting by the members on the acceptance or rejection of a contract agreement or whatever seems to be optional from union to union. It is not an absolute or a legal requirement that I know of, but most unions I think do follow it in some form. Sometimes it is by a showing of hands, sometimes by secret ballot, and sometimes it is voice vote and so forth.

As far as the examples that were given this morning—and I listened very carefully to see if I recognized any of those examples—some of the names of companies were familiar to me, but I am not familiar with the details of their labor dispute or their bankruptcy problems. So I cannot really comment on whether what was said is accurate or not.

In my own experience, since the issuance of the *Bildisco* case, I have not come across a single instance of an employer who has come to me or that I even know about, who has decided to go into chapter 11 because of the *Bildisco* case. I do cover a good bit of the country, and I think I would know if this was a mass migration into bankruptcy by the business community. I just do not think the scope of the problem or the scope of the threat is anything like what the unions portrayed here this morning.

Mr. IRVING. Senator, I would agree with that. I do not know of any instance where an employer has schemed to use chapter 11 to rid himself of a union or to rid himself of a union contract. As Mr. Thompson pointed out earlier, such conduct might constitute criminal fraud or an SEC violation. There are serious sanctions for abusing bankruptcy laws. I really know of no real life example like that at all. To those who make this claim I say: "Where's the beef?"

I have not seen it, and I do not think you are going to find it. Indeed, if you check about the examples that were sighted by unions here today, I think you will find that those employers have done what employers normally do. That is, long before filing a chapter 11 petition, an employer goes to his union and says: "We have 2 years to run on this contract. We are in dire straits. We need concessions. Come, let's sit down." Such employers are willing to give their unions information, to show them what their problems are. It is only when distressed employers are stiff-armed by their unions that they finally resort to chapter 11.

The minute an employer goes into chapter 11, normally he knocks again on his union's door: "Remember what I offered to you last month? Remember what I offered to you last week? I still need it. I am in chapter 11. Does that make any difference? One option that is available is to set this contract aside. I do not want to have to do that. Come forward and negotiate concessions." Again, it is only when such concessions are not forthcoming and the debtor feels that reorganization may be jeopardized, that he winds up having to set the contract aside. This is not a happy situation for the debtor either.

From my own experience, frequently unions do not allow the debtor's employees to vote on the debtor's proposal. Indeed, my understanding is that the Teamsters Union permits employees to vote on whether or not they want to strike, not on management's last offer. I have been involved in two such circumstances myself. In one case, the employer has gone from chapter 11 into chapter 7 liquidation, and I know for a fact in that case that the employees were never afforded an opportunity to vote on management's last offer. This is something you may want to consider for your legislation. I think it is important.

Mr. **Liebenson**. There seems to be an assumption here, both on the unions' part and certainly from some management, that a decision to go into bankruptcy or chapter 11 is made on one day, and on the day before nobody heard anything about it. There has to be some history. Having worked in an industrial plant, the rumormill is very active. As soon as that plant starts laying off workers, as soon as they start shutting down certain of their production lines, as soon as you see a reduction in inventory or the fact that there is a lack of sales coming into that company, just about everybody in that plant knows it.

So if all this is happening over a period of time, when the company is in trouble, the work force usually knows it well in advance and before the company even will admit it to itself. The other part Mr. Granof would like to answer.

The **Chairman**. Sure. Mr. Granof?

Mr. **Granof**. As Mr. Liebenson said earlier, for a small business, the last thing they want to do is to slide into bankruptcy. I think they would be among the last to scheme and plot to get rid of the union contract through bankruptcy.

With respect to voting on union contracts, that does vary. My recollection is, it is an unfair labor practice for management to insist in negotiations that a contract be submitted to employees for a vote. It is really an internal union matter.

The **Chairman**. Well, thank you all. I have to say, as a person who has been intimately involved in trying to bring all parties together, I just do not know where we are going with it. I just do not know whether we can get the parties together. It is a very difficult problem, and I just hope we can get together and come up with some solutions. So I am challenging you to look for innovative solutions that will help solve some of the problems the unions have with this, as well as your own. I just feel badly that this bankruptcy bill is so held up by this one issue, because it is really a crucial bill. On the other hand, I suspect the Republic will survive if it does not pass this year.

My personal bet is that it will not pass this year. I cannot even get the unions to agree on the language that we arrived at that certainly moves in their direction. It is certainly between the *Bildisco* case and the REA approach. Frankly, I think they all have admitted to me it was a pretty good resolution of these problems for them. It just is not as good as the House's, which goes all the way. Yet, a number of you cannot go as far as what that particular compromise was. So I just do not know how to do it, unless we can come up with some more innovative approaches that might solve these problems. I certainly am going to be open, and we will try and get you all together and see what can be done.

I have to admit, it is going to be very difficult to do, and I also admit that both sides have good points here. You certainly have made good points here today, with which we were familiar in large degree during the negotiations that took place. I think the unions, naturally, have concerns, too. With that, we appreciate your coming. We are glad that you took the time to be here. I am happy that you were able to come back at 2 o'clock and that Senator Biden had this opportunity to asking you questions.

Mr. **Irving**. Senator, our concern on the House side was that we had not had an opportunity to speak our piece, and we certainly appreciate that opportunity today.

The **Chairman**. There is one aspect we may still have to do, and that is those nonunion employees who nobody is fully representing here today, although Mr. Thompson raised their concerns in his remarks, and you did also Mr. Irving. Thank you so much. We appreciate your being here today. I am sorry these hearings have taken so long.

We will now go to the last panel on this joint hearing. We will call on the Honorable Ralph R. Mabey of LeBoef, Lamb, Leiby & MacRae, out of Salt Lake City, UT; Mr. Herbert P. Minkel, Jr., of Fried, Frank, Harris, Shriver & Jacobson, in New York City; and Mr. Daniel Lewis, of Arnold & Porter, here in Washington, DC.

We will start with you, Mr. Mabey. We are happy to have you here from my hometown of Salt Lake City. We know you have been intimately involved in these matters, and you have gone through some particularly difficult times, both as a bankruptcy judge and now as a private practitioner.

STATEMENT OF HON. RALPH R. MABEY, ATTORNEY AT LAW, LeBOEF, LAMB, LEIBY & MacRAE, SALT LAKE CITY, UT, AND FORMER BANKRUPTCY JUDGE

Judge **Mabey**. Thank you, Mr. Chairman. It is a pleasure to be here. At the outset, I acknowledge freely that I have no "revealed truth" on this matter and can speak for no group, as the others who have testified here today. I can only speak, based on my experience on both sides of the bench with respect to these matters. I would prefer simply to get to the points as I have heard them discussed today.

First of all, with respect to the stricter standard, the so-called *REA* standard or the standard proposed in the House bill, my initial reaction to that standard has been that imposing that stricter standard would not really make that much difference in most of the cases which have come before the court. I think the statement by the AFL–CIO, to the effect that 19 out of 22 contracts have been rejected when presented to the court, is probably fairly accurate.

The **Chairman**. Does that show a bias against the AFL–CIO, in the fact that 19 out of 22 or so contracts have been rejected, or is it just the realities of bankruptcy?

Judge **Mabey**. I think it is just the realities of the straits of the companies generally, and it is also true, I think, that rejection of a contract where the union is the major and dominant force in the company is a very serious matter, and there just are not that many that get litigated. So where the union is the dominant force and covers most of the general employees, it seems to me that courts have been applying, in effect, a rather strict standard.

I am reminded of the couple of cases that came down before the Supreme Court ruled in *Bildisco,* the *IML Freight* case in Salt Lake City and the *Rath Packing* case, earlier mentioned, in Iowa. In each of those cases, the judge went through all of the standards and said that rejection would be attained under any of the standards. I think there is some significant emotion attached to the standard which ought to be kept in mind.

Having said that, Mr. Chairman, I would like to point out that in many special circumstances, this heightened standard does indeed present some questions, to which I do not have the answers but which I can raise. When the union becomes the less-dominant force in the equation and nonunion employees play a significant role, then the *REA* standard works a disadvantage to the nonunion employees clearly. In effect, the court has to find that the last drop of blood has been wrung out of the nonunion employees, and that still the company cannot survive, before it can reject the contract under this heightened standard. Thus, where there is a significant nonunion involvement, the heightened standard may indeed cause some significant problems.

A further problem arises, as mentioned earlier in the discussions today, where the union has national concerns, while the troubled company has only local concerns. Thus, for instance, in the *IML* case, the union made it quite clear, I felt, that it puts its national contract above the 2,000 jobs at stake in that company; and, if push were to come to shove, the union might well prefer to see the local company go under and sacrifice those union jobs in order to hold the line with respect to the national contract.

It seems to me that in a bankruptcy reorganization situation, the interests of that company, with its creditors and employees, ought to be paramount.

A further problem with the standard arises, I think, in cases where there are small unions together with large unions. The example which comes to my mind is again the *IML* case. In that case, the International Brotherhood of Teamsters was the large union. The machinists comprised the small union. The court was able to rule and did rule that unless the Teamsters' contract was rejected, the company would fail. However, the machinists represented only a small number of employees. There would be no way to rule that *IML* would fail absent rejection of the machinists' contract.

The upshot is a great irony, I would suggest, Mr. Chairman, and that is that the smaller union is able to protect its contract, applying the *REA* standard, and is not obligated to contribute at all to the reorganization, whereas the larger union, even under the *REA* standard, is going to have to face rejection and renegotiation of its contract. However, if the court can balance the equities, then the court can say to the small union, since the larger union's contract has been rejected, as a matter of equity you should be obligated to contribute as well in some fair-minded way.

A further problem, Mr. Chairman, with regard to the test in the House bill—and perhaps it is an arcane problem and maybe that is why it occurred to me—is in the area of chapter 9, the municipality reorganization. The test in the House bill is that the jobs will be lost and financial reorganization of the debtor will fail. It would seem to me that this would preclude any rejection of labor contracts by a municipality under chapter 9, which retains the taxing authority to avoid ultimate failure, and that is perhaps a matter which the committees may desire to consider.

A final problem that does occur to me with respect to this higher standard is where there are a number of unions in different geographical locales in the same company. Thus, it may well be that it makes sense to close down a plant which is not profitable unless the contract can be rejected. But, that plant closure may not go to the ultimate ability to reorganize. The upshot here would be that, as a practical matter, the union at the small plant will lose its jobs if rejection is not allowed, but the second part of the House test, the inability to reorganize test, will not be able to be met.

I would just note that the focus of the labor comment today was upon labor unions which are the dominant force in a business and did not consider businesses with a number of different unions.

I would like to turn, if I could for a moment now, to the question of rejection at the outset of the case, or simply failure to honor the contract up until the time of a court ruling. It is a difficult problem, and I can only speak from my observations and experience. They are, as follows:

First of all, it is human nature for a business to postpone filing chapter 11. In all my experience, if anything, businesses waited too long to file chapter 11. They have used up all their liquid assets and they are really over a barrel. They have negotiated with the unions typically. Having waited that long, there is the problem of getting some sort of immediate relief, and certainly some expedited proceeding is very important to that relief. I am not sure who comes first: whether you break first and then get the hearing or do it the other way around.

There is a problem, however. If the contract cannot be abrogated early on, it is, in my experience, almost impossible for a troubled business to get any financing to carry it through the reorganization. Typically, lenders who were willing to loan during this interim period, before a plan can be confirmed, are willing to loan based upon progress which suggests the likelihood of rehabilitation. If the contract issue is central and remains unresolved, and no interim relief has been allowed, then it may be difficult to obtain this financing.

Finally, with respect to this interim relief issue, in my experience it is extremely difficult for a court to tell early on exactly what sort of agreement will allow the company to survive. It is hard for the court and the parties indeed to predict, to guess at, the outcome of the reorganization in the first few days. So it would be unfeasible, I think, for the court to decide immediately that the *REA* standard applies, in a number of situations at least, and even to balance the equities immediately.

That leaves the problem of whether or not interim relief must be available in order to help out until the dust settles enough to tell in which direction the reorganization might go. Thank you.

The CHAIRMAN. Thank you, Judge Mabey, for your extensive advice on bankruptcy matters. We appreciate it. It is a very technical and difficult subject for us here in the Congress, and we appreciate having you here. We will have a question or two before we are through.

Mr. Minkel, we will turn to you.

STATEMENT OF HERBERT MINKEL, ATTORNEY AT LAW, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, NEW YORK CITY

Mr. MINKEL. Mr. Chairman, my name is Herbert Minkel. I am a member of the law firm of Fried, Frank, Harris, Shriver & Jacobson. I am also the contributing editor of Collier on Bankruptcy, responsible for the sections dealing with business reorganizations. Although I was invited to appear here as a private practitioner, I have been asked by the legislation committee of the National Bankruptcy Conference to speak on behalf of the conference and to give you the conference's views with respect to this legislation.

As you may be aware, the National Bankruptcy Conference is a nonprofit, unincorporated organization, composed of representatives of different groups who are interested in the administration of bankruptcy law. The conference includes bankruptcy judges, full-time professors of law, and practicing attorneys who specialize in this area. There are 65 full members and 8 associate members from all areas of the country.

Reports concerning the negotiations surrounding proposed section 1113, which have filtered back to New York, recall descriptions of the western front in World War I, with the unions in their trenches and the chamber of commerce and the National Association of Manufacturers in theirs. The chances of survival in an exposed position between their fields of fire appear to be slight indeed. Therefore, I confront the prospect of maneuvering in this free-fire zone with considerable trepidation.

Having listened to the presentations on behalf of the Teamsters and the AFL–CIO, and having agreed with a substantial number of the points made by both, and then having listened to the presentations made by the representatives of business and not disagreeing with many of their positions, I realize the problem that you are having in dealing with this matter. There are, however, a number of clear misunderstandings on the part of members of your committee, at least in terms of what they have said in terms of these hearings.

First, with respect to something Senator Biden said this afternoon, I think it is the general consensus that the 1978 Bankruptcy Code did not change the rules regarding collective-bargaining agreements. The law with respect to collective bargaining agreements was the same pre-code and under the code.

Second, the *REA Express* case was certainly not the law of the land. The fact is that in most cases that have come before bankruptcy courts on rejection of executory collective-bargaining agreements, the facts are so clear that applying the *REA Express* standard, the court could conclude that the contract should be rejected. But the *REA Express* standard was the law only in the second circuit, and each of the circuits that considered this issue subsequent to *REA Express* came out differently. In fact, they came out the way the Supreme Court did in the *Bildisco* decision, for the reason that the so-called balancing of the equities test, having established that the contract is burdensome, better effectuates the policies of chapter 11.

One thing that is lost in the debate between the unions and the manufacturers is the fact that collective-bargaining agreements are generally not the subject of rejection in chapter 11 cases. Most collective-bargaining agreements are not dealt with in chapter 11 at all, because the wage scale and the other benefits in the particular contracts are in line with the industry. Therefore, the creditors' committee and the company will not have anything to do with the unions; they want to avoid having a strike.

The second category is the category where collective-bargaining agreements are renegotiated in chapter 11. We have heard a lot about the trucking industry, and we have heard some references to the air transportation industry, but the truth of the matter is that a much more typical situation is the manufacturing company, which has pledged its accounts receivable and its inventory. The company has to ship after the filing of bankruptcy or it has no working capital with which to function, no working capital to pay any salaries, no working capital to buy any of the necessary raw materials to produce goods.

That company cannot take a strike. That company has to negotiate with the unions, and the unions are generally responsive in those negotiations. They generally do not want to see the company go under. They want to protect their jobs. And out of that collective-bargaining process comes a modified collective-bargaining agreement.

There are three exceptions to that general rule. That is, first, where a company has filed a petition exclusively to reject a collective-bargaining agreement—has no other need of financial rehabilitation. We call that a bad-faith filing and the courts that have considered this have held that this kind of a case should be bounced out of bankruptcy court under section 1112. You do not need a new section 1113 to deal with the so-called bad-faith filing.

The second situation is a situation which has been alluded to previously today, and that is the situation where a union has a national uniform contract, and they care more about the national uniform contract than they care about whether or not a particular debtor survives. They will lay it on the line. That contract is not going to be changed. If you have to go out of business, so be it. For that company, the only effective relief is to go into a chapter 11 case and bring an application to reject the contract.

The third kind of situation is a company which has financial troubles. It has negotiated with its unions in good faith. It has not been able to resolve the collective bargaining issue. It can take a strike. It has cash balances. It does not have pledged receivables and inventory. It goes into chapter 11. It brings on its application for rejection. The union is free to go out, if it wants to, and the court then has to deal with what kind of a standard applies to the rejection application.

As Judge Mabey has said quite eloquently, it is not necessarily as easy as some of the witnesses would suggest. Take the case of White Motor Co. When White Motor filed, it had an archaic huge union plant in Cleveland. It also had a modern plant which did not have a union in Bow Valley, VA, and it had a plant in Ogden, UT. If that company had gone into a proceeding early enough and had bled to death by the time it did go into a proceeding, it might well have made the decision that it could reorganize but that it could not reorganize around the Cleveland operation.

In such a situation, if you adopt the *REA Express* standard, the court would be faced with the situation of having to close a plant but honor a union contract, continuing to make payments which could eventually make it very difficult to effect a plan. Now, how a court is supposed to make that judgment early in a case is very difficult to figure out, and that is why the third circuit, the eleventh circuit, and the Supreme Court held that there should be an equitable balance which gives the court some discretion in dealing with these very difficult cases.

The National Bankruptcy Conference had an opportunity to review the House bill as it was originally drafted, and they reached the following conclusions. First, subject to an accelerated procedure being adopted for rejection, the debtor should comply with the executory contract pending rejection and should have a duty to bargain. However, there must be a procedural mechanism which works, not a procedural mechanism which becomes an excuse for litigation and appeals, and I want to say more about that later.

The second position that the NBC took was that there should be no change in the priority of claims arising by reason of the rejection. The law as it stands should not be changed. The third matter that they took up was that there should be no retroactive application of section 1113. I agreed with Mr. Presser in his statement, before he started to answer questions. He said in his statement that the law should take effect when the President signs it, and there should be no window which would encourage companies to file under an old standard so as to avoid a new standard. When his counsel got into the picture, we suddenly started to hear about Supreme Court cases which suggests that they are really talking about retroactive application of the standard. They want it to apply to companies that are presently in proceedings, and I get the impression that they particularly want it to apply to Continental Airlines.

In my statement, I cited the decision of the bankruptcy court in the immediate aftermath of Continental's filing. There was an attempt to throw out the case as a bad-faith filing and to enjoin the company from not honoring the collective bargaining agreements. The court, I believe, took something like 11 days of testimony and entered very detailed factual findings, and the conclusion that the court reached was that the company could not survive under the union contracts. Hence, that court could have adopted the *REA* standard, and it could still have found that those contracts should be rejected.

The final position that the NBC took was that the balancing-of-the-equities test was the appropriate test.

In looking at what in my statement I have called the "alternate proposal," which was referred to in these hearings as the "Hatch proposal," there is a threshold test. The threshold conditions in that draft of section 1113, taken as a whole, in my view, are unworkable in the context of corporate reorganizations.

The problem I think can be best illustrated in terms of a hypothetical case. In most situations, if a court is faced with a clearcut factual situation—namely, the union and management have not been able to come to an agreement with respect to modification of the collective bargaining agreement, the court must determine whether the collective bargaining agreement is burdensome? Applying the balancing of the equities or the *REA Express* standards, and depending on which test is applied, the court must determine whether the contract should or should not be rejected.

But section 1113 of the alternate proposal prevents the court from reaching the basic issue, because it requires the court to first determine the threshold issue. But how? Is an offer which reduces the wage scale to a break-even point reasonable? From the union's point of view, maybe yes. But how does the debtor reorganize without net cash flow to satisfy the claims of creditors? If one concedes that net cash flow is necessary for reorganization, the minimal-offer test would require the court to determine the level of net cash flow necessary to fund a plan of reorganization.

But remember, a plan will not have been negotiated. In fact, early in the case, the creditors committee may not have been formed. If it has been formed, it will have barely begun to function. For a plan to be negotiated, the committee will need to evaluate the debtor's business plan and to review projections based on that plan. I can assure you that the experience of bankruptcy practitioners teaches us that the debtor's business plan and projections are never too pessimistic. In the early part of the case, the debtor's approach to a chapter 11 is generally far more optimistic than the terms of the plan as finally negotiated. So the court, early in the case, will be expected to make a determination with respect to what is an appropriate minimal offer, at a time when that is a far more difficult analysis than the analysis of whether the contract should be rejected outright.

There are a couple of other points, in terms of the language of the proposal which says "the debtor shall provide the representatives information necessary to a fair evaluation of the proposal." My understanding is that the courts have held in collective bargaining cases that the employer has a duty to disclose wage information. I also understand that the employer may withhold information relating to trade secrets. Interestingly enough, the Supreme Court has recently held that an employer need not bargain about any economically motivated decision to close an operation.

One of the problems that the minority decision of Judge Brennan in the *Bildisco* case alluded to was that Rhenquist's decision did not try hard enough to harmonize the National Labor Relations Act and the Bankruptcy Code. I hope that in passing legislation, whatever duties are imposed on an employer to share information, or whatever is articulated as the proper subject of collective bargaining, it will be harmonized with the National Labor Relations Act so that the Bankruptcy Code is not telling employers they have to negotiate issues that they would not have to negotiate under the NLRA or give information which they would not have to give, unless there are some pretty ironclad protections in terms of confidentiality.

Finally, I am a little bit amused by the fact that everyone testifying today has talked about the bankruptcy court determining these issues, and whether the bankruptcy court is biased in one direction or prejudiced in another. Having reviewed the jurisdiction and venue provisions of the proposed amendment in the nature of a substitute for H.R. 5174, at least in the form in which it was when it almost went to the floor, I do not know who would decide this controversy.

The application to reject would be automatically referred to a bankruptcy judge. If any party filed a recall motion, it would then be bounced up to the district court. The district court would have to determine whether or not it was a core matter which could be sent down to the bankruptcy court for a final hearing and final order, or whether this court should recall it even if it is a core matter, or whether it is not a core matter and involves Federal law in which event recall is mandatory. Then this court has the option of sending it back to the bankruptcy court as special master or sending it to a magistrate for findings of fact and conclusions of law.

This is an example of how almost everything in bankruptcy under the Senate amendment would put bankruptcy lawyers into the general posture of being Ping-Pong balls bounced back and forth between the bankruptcy court and the district court. But in this context, where people are so concerned whether the debtor should have to live with the contract after the filing date and whether the debtor can get quick and effective relief, I would hope that your committee would take a look at how does proposed section 1113 relate to the jurisdiction and venue provisions of the Senate bill as I understand it is presently drafted.

Thank you.

[The prepared statement of Mr. Minkel follows:]

PREPARED STATEMENT OF HERBERT MINKEL

Mr. Chairmen and Members of the Committees:

My name is Herbert Minkel. I am a member of the law firm of Fried, Frank, Harris, Shriver & Jacobson. I am also the contributing editor of Collier on Bankruptcy, responsible for sections 1101 through 1146 dealing with reorganizations. It is my understanding that I have been invited to testify before this Committee because I have some experience representing debtors and creditors in cases in which the rights of employees under collective bargaining agreements were at issue. The Legislation Committee of the National Bankruptcy Conference has authorized me to appear on behalf of the Conference. As you may be aware, the National Bankruptcy Conference is a nonprofit unincorporated organization composed of representatives of different groups who are interested in the administration of bankruptcy law. The Conference includes bankruptcy judges, full-time professors of law and practicing attorneys who specialize in this area. There are 65 full members and 8 associate members from all areas of the country. Since 1932, the conference has devoted itself to improvement of bankruptcy law and its administration.

It is our understanding that we are being asked to comment on S. 2462, which was filed on March 22 by Senator Kennedy and which contains substantially the same language as the proposed section 1113 of H.R. 5174, dealing with rejection of collective bargaining agreements. We have also been provided with a proposed version of section 1113, which we have been advised was under discussion with representatives of organized labor on March 28 and 29. A copy of this section is attached as Exhibit A to this statement. For purposes of identification, I will refer to this as the alternate proposal.

It appears that the *Wilson Food*, *Continental Air*, and *Bildisco* cases and the problems presented by the *Marathon Pipe Line* case have focused considerable public attention upon bankruptcy and the rights of employees under the Bankruptcy Code and the National Labor Relations Act. Reports concerning the negotiations surrounding proposed section 1113 which have filtered back to New York recall descriptions of the Western front in World War I, with the unions in their trenches and the Chamber of Commerce and the National Association of Manufacturers in theirs. The chances of survival in an exposed position between their fields of fire appear to be slight indeed. Therefore, I confront the prospect of maneuvering in this free fire zone with considerable trepidation.

Before discussing the language of these two proposals, I would like to briefly discuss several general principles of reorganization practice.

First, chapter 11 of the Bankruptcy Code was designed to serve as a framework in which parties in interest can negotiate in good faith and resolve issues arising in reorganization cases. Congress attempted, and in my opinion generally succeded, in creating a structure in which reorganizations may be achieved in a prompt and orderly manner by negotiation and compromise. In those cases where negotiations fail, the bankruptcy court was vested with pervasive jurisdiction to sort out the rights of the parties, with all of the risk, expense and delay which litigation imposes.[1] Chapter 11 creates so many opportunities for litigations that it, in fact, encourages compromise. For want of a better description, chapter 11 creates a "balance of terror."

In most chapter 11 cases, the debtor is insolvent in the bankruptcy sense. The fair market value of the debtor's assets is less than the aggregate of the debtor's legal liabilities. Thus, unsecured creditors are not entitled to interest on their claims subsequent to the filing date. In an era of double-digit interest rates, delay in a chapter 11 case means significant reduction in the present value of distributions available to creditors

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1. *Northern Pipeline Construction Co. v. Marathon Pipe Line Company* ___ U.S. ___ (1982) (Supreme Court held that the pervasive grant of jurisdiction to an untenured Article I court violated Article III of the U.S. Constitution. Subsequent to the effective date of its opinion, the bankruptcy courts have been functioning pursuant to Emergency Rules promulgated by the various United States District Courts. H.R. 5174, as adopted by the House of Representatives, would create a rather complex jurisdiction framework involving the district courts, bankruptcy courts, as units of the district court, and magistrates.

under a plan.[2] In streamlining the reorganization sections of the Bankruptcy Act and creating chapter 11, Congress provided specific protections against abuse, but also preserved the necessary flexibility to permit the negotiation of plans which meet the minimum standards of chapter 11.[3]

This has worked to everyone's advantage. The bank with a lien on a debtor's assets in most cases knows that the assets are worth more in the hands of a going concern than they are in liquidation. The bank also knows that its claim may be satisfied in full over time under the terms of a plan, but that in a liquidation, the bank may have to assume the burden of liquidating its collateral. Unsecured creditors know that they will get more in a reorganization than in a liquidation and that if they are to receive distributions quickly, they may have to let junior classes of creditors and equity interests retain an interest in the debtor. Management and the equity interests they represent know that they may be able to delay creditors, but that the Code limits a debtor's exclusivity period for filing a plan[4] and, therefore, in the face of unreasonable delay, creditors may file their own plan or seek the appointment of a trustee.[5]

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[2] See 124 Cong. Rec. H 11,102 (daily ed. Sept. 28, 1978) (remarks of Cong. Edwards); 124 Cong. Rec. S 17,418 (daily ed. Oct. 6, 1978) (remarks of Sen. DiConcini) ("One cannot over emphasize the advantages of speed and simplicity to both creditors and debtors.")

[3] 11 U.S.C. § 1129(a).

[4] 11 U.S.C. § 1121(c).

Since the subject of this hearing is the treatment of collective bargaining agreements, I assume that your Committees are concerned with how employees and their collective bargaining representatives fit into this reorganization structure. In the overwhelming number of chapter 11 cases, the rights of employees under collective bargaining agreements are not affected or collective bargaining agreements are modified pursuant to negotiations not dissimilar to negotiations outside of the chapter 11 arena. In many cases, the wage scale of union employees and their fringe benefits and work rules are not out of line with other companies in the industry and thus are not the primary cause of the debtor's financial condition. In such circumstances, collective bargaining agreements are simply not an issue in such cases.

In a case where the terms of a collective bargaining agreement places an employer under a competitive disadvantage, the issues are usually addressed and resolved by negotiation. As is the case with most negotiated settlements, the resolution is generally unsatisfactory from everyone's point of view and thus reasonably equitable.

In most cases, modification is negotiated on a consensual basis because the union recognizes that there is a reasonable likelihood that failure to grant consessions will result in the loss of jobs and management and creditors recognize that the debtor is too weak to survive a strike.[6] This is particularly true in cases where the debtor is a manufacturing company that has encumbered its inventory and receivables. Such companies have to produce and ship goods in order to generate new receivables, which, in turn, creates credit availability under the terms of the debtors' credit agreements. In those cases, an interruption of shipments will deprive the debtors of cash necessary to purchase raw materials and pay employees.

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[5] 11 U.S.C. § 1104(a).

There are three exceptions to the usual scenerio. The first exception, is the company without serious financial problem which turns to bankruptcy for the primary purpose of rejecting a collective bargaining agreement. The courts have correctly ruled that this is an improper motive and that such a filing is in bad faith and thus, the petition should be dismissed.[7]

The second exception is where a national union has a basic contract applicable to all producers. If the national union is more concerned about the uniform application of the contract than about the jobs affected by the closing of a particular plant, the debtor may have no choice but to file and to apply for rejection of the contract. This happens after the failure of prepetition negotiations and generally in circumstances where the evidence would demonstrates that failure to reject the contract will result in the closing of the plant.

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[6] Petrusch v. Teamster Local 317 (In re Petrusch), 667 F.2d 297 (2d Cir. 1981) (court of appeals affirmed district court's reversal of the bankruptcy court's order to stay picketing by union to force payment of prepetition claim); Truckdrivers' Local Union No. 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976).

[7] In re Tinti Construction Company, Inc., 10 B.C.D. 767 (Bankr. E.D. Wisc. 1983).

The third exception is the case of a debtor with serious financial problems but which has not encumbered its inventory and receivables or which has sufficient cash so that it can afford to take a strike. Such a debtor may file for relief under chapter 11 because of a need to reorganize and may contemplate renegotiation or rejection of a collective bargaining agreement as part of its reorganization effort. Obviously, it is in this context that the issue of the standard for rejection is most important and most difficult to apply. It should be remembered, however, that this is the truly exceptional case. In formulating special provisions for rejection of collective bargaining agreements, Congress should not enact unworkable statutory provisions solely to deal with this type of case.

The National Bankruptcy Conference reviewed the original language of H.R. 5174. They concluded that any amendment of the Bankruptcy Code to deal with the problem of executory collective bargaining agreements should include the following elements:

1. The debtor should comply with the National Labor Relations Act[8] and terms of the contract until the contract is rejected by order of the court;

2. If the debtor must comply with the contract pending rejection, the Code should include a procedural mechanism for an accelerated hearing and final adjudication of the debtor's application to reject.

3. The law which controls the priority of claims arising by reason of rejection should not be changed. Damages associated with rejection of executory contracts should continue to be treated as prepetition claims[9];

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[8] Section 8(a)(5) of the NLRA provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5). Section 8(d) of the NLRA provides that: ". . .[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

[9] 11 U.S.C. § 365(g)(1).

4. Any amendment to the Bankruptcy Code relating to collective bargaining agreements should not have retroactive application; and

5. The standard set by the Supreme Court in Bildisco[10] for rejection, namely, the "balance of the equities" test is preferable to the so-called "REA Express" standard.[11]

The National Bankruptcy Conference has not, as a group, had an opportunity to review the threshold standard contained in section 1113(b)(1) of the alternate proposal, which states that:

> [T]he debtor shall make a proposal to the authorized representatives of the employees covered by the agreement providing such minimal modifications in the employees' benefits and protections in order to promote the reasonable likelihood of a successful rehabilitation of the debtor, by taking into account all of the circum-

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[10] NLRB v. Bildisco (In re Bildisco), ___ U.S. ___ (1984) (". . .[T]he bankruptcy court should permit rejection of a collective-bargaining agreement under section 365(a) of the Bankruptcy Code if the debtor can show that the collective-bargaining agreement is a burden to the estate and if careful scrutiny of equity balances in favor of rejection of the labor contract. The standard which we think Congress intended is a higher one than that of the 'business judgment rule' but a lesser one than that embodied in the REA Express opinion of the Court of Appeals for the Second Circuit." See also Local Unions 20 v. Brada Miller Freight System, Inc. (In re Brada Miller Freight System Inc.), 702 F.2d 890 (11th Cir. 1983).

[11] Brotherhood of Railway, etc. v. REA Express, Inc., 523 F.2d 164 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975) ("court must conclude that an onerous and burdensome collective bargaining agreement will thwart efforts to save the debtor from collapse.").

> stances facing the debtor and by balancing the interests of the debtor, the creditors and other employees of the debtor; which balancing shall include the good faith efforts of the debtor to seek appropriate participation of such creditors and employees. The debtor shall provide the representatives information necessary to a fair evaluation of the proposal.

Compliance with this subsection is necessary before the court may reject a collective bargaining agreement. The actual standard for rejection contained in section 1113(c) is the so-called Bildisco standard, namely, a balancing of the equities. It is submitted that the threshold conditions contained in section 1113 are unworkable in the context of corporate reorganizations. Subsection (b) will lead to litigation concerning whether the debtor's offer is really a "minimal modification." This litigation will delay the reorganization process and, if the debtor is required to honor the contract pending resolution of the threshold issue, it will jeopardize the debtor's ability to reorganize.

It is important to distinguish between application of the standard for rejection and application of the threshold requirement. In applying the "balance of equities" test, a court should consider "all of the circumstances facing the debtor" and balance "the interests of the debtor, the creditors and other employees of the debtor." In balancing the equities or in determining that the rejection is "essential" to a successful reorganization, the court will consider whether the debtor and the union have acted in good faith. But, in applying Bildisco or

REA Express, the court only has to decide whether the contract is so burdensome that rejection should be granted. In applying the threshold condition, a court, for all practical purposes, must determine what contractual terms will satisfy the interests of creditors, other employees and equity interests. Asking a court to determine whether or not the last offer made by the debtor represents the minimal modification of the collective bargaining agreement necessary to permit reorganization, is to request the impossible. To apply the test the court will have to consider all of the possible offers which could have been made between the contract, on the one hand, and the debtor's offer of minimal modification, on the other. The court will then have to determine whether the debtor could successfully reorganize if subject to a contract so modified.

The problem may be illustrated by a hypothetical case. Take the case of a debtor whose projections show continuing future losses if forced to honor its collective bargaining agreement. Prepetition negotiations are at an impasse. The debtor files for relief under title 11 and files an application to reject the contract. The court considers the evidence and determines that failure to permit rejection would cause the collapse of the debtor's business. Under the REA Express and the Bildisco standard, the contract should be rejected. After rejection, the debtor will still be under an obligation to bargain in good faith with the employees' representative. In those negotiations, management will try to get the best contract it can get. The union will do the same. In other words, business as usual.

Section 1113 of the alternate proposal prevents the court from reaching the basic issue because it requires the court to first determine the threshold issue. But how? Is an offer which reduces the wage scale to a break even point reasonable? From the union point of view, maybe yes. But how does the debtor reorganize without net cash flow to satisfy the claims of creditors. If one concedes that net cash flow is necessary for reorganization, the minimal offer test would require the court to determine the level of net cash flow necessary to fund a plan of reorganization. But, remember a plan will not have been negotiated. In fact, early in the case, the creditors' committee may not have been formed. If it has been formed, it will barely have begun to function. For a plan to be negotiated, the committee will need to evaluate the debtor's business plan and review projections based on that plan. Experience teaches us that the debtor's business plan and projections are never too pessimistic.

In summary, the task of evaluating an offer of minimal modification is geometrically more difficult than applying the REA Express or Bildisco standard or any other standard which Congress considers appropriate.

The evidentiary showing necessary to obtain rejection of a collective bargaining agreement is never easy, but the evidentiary showing necessary to satisfy section 1113(b) is impossible.

With respect to the applicable standard for rejection of executory collective bargaining agreements, the Bildisco standard is far more reasonable than the standard articulated by the Second Circuit in REA Express. It simply is not possible to make a determination in the early stages of a chapter 11 case that rejection of a collective bargaining agreement supplies the difference between successful reorganization and force liquidation. In many cases, the REA Express standard will not present a problem,[12] because the contract in question will apply to all or a significant portion of the debtor's employees and it can be demonstrated that rejection is absolutely necessary if the debtor is to be reorganized.

In other cases, strict application of the REA Express standard will impose significant inequities upon creditors, employees not covered by the collective bargaining agreement and equity interests. For example, the company might have several plants covered by separate collective bargaining agreements involving different unions. Management of the company determines that a specific plant must be closed and determines that the collective bargaining agreement should be rejected so as to permit termination of the underfunded pension plan. As a result of termination of the plan, the Pension Benefit Guaranty Corporation ("PBGC") will take over the plan assets as trustee, and will be rerequired to fund the vested guaranteed benefits under the plan. Inability to reject the collective bargaining agreement and to terminate the plan, may have the effect of increasing PBGC's administrative claim and to cause additional administrative expenses to accrue against the estate. Such a result, in the case of a plant closing, is inequitable to creditors and equity security holders. Under the REA Express standard, the court would have to determine that the accrual of additional administrative expenses would make reorganization impossible. This determination cannot be made with precision in the early stages of a chapter 11 case.

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[12] In re Continental Airlines Corp., 11 B.C.D. 623 (Bankr. S.D. Tex. 1984).

The final point to be made with respect to the alternate proposal is the requirement that:

> "The debtor shall provide the representatives information necessary to a fair evaluation of the proposal."

Courts have held that, in connection with negotiation of collective bargaining agreements, the employer has a duty to disclose wage information.[13] Employers may withhold information relating to trade secrets not related to labor expenses.[14] The Supreme Court has held that an employer need not bargain about any economically modivated decision to close an operation.[15]

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[13] Curtiss-Wright Corp. v. NLRB, 347 F.2d 61 (3d Cir. 1965).

The duty of an employer to disclose information under section 1113 should not increase the employer's disclosure obligations under the National Labor Relations Act. In addition, section 1113 should not force a debtor to bargain in circumstances where the debtor would not be required to bargain under the NLRA. Since the requirement to provide information as contained in section 1113 relates to the ability to confirm a plan, union representatives may attempt to obtain information under proposed section 1113 which they would not be entitled to receive under the NLRA. If section 1113 is interpreted to provide access to such highly sensitive information, the effect would be to create an imbalance in the negotiating position of the debtor versus the union.

Conclusion

If Congress can provide for prompt adjudication of applications to reject collective bargaining agreements, reversing that portion of the Bildisco decison which permits unilateral non-compliance with such agreements, is appropriate. Congress should not adopt the *REA Express* standard or any standard which requires the debtor to prove that failure to reject would force the debtor to liquidate. Congress should not adopt a threshold test of the sort contained in section 1113(b) of the alternate proposal since the test is totally impractical and will only increase the difficulty that courts have in determining what collective bargaining agreements are the proper subject of rejection in chapter 11.

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[14] Kroger Co. v. NLRB, 399 F.2d 455 (6th Cir. 1968).

[15] First National Maintenance Co. v. NLRB, 452 U.S. 666, 686 (1981).

§ 1113. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS

(a) The debtor in possession, or trustee if one has been appointed under the provisions of this chapter, other than a debtor covered by subchapter IV of this title and by title I of the Railway Labor Act, may reject collective bargaining agreement under this title only if and after the court approves the rejection of such agreement in accordance with the provisions of this section.

(b)(1) Prior to filing an application for the rejection of a collective bargaining agreement, the debtor shall make a proposal to the authorized representatives of the employees covered by the agreement providing such minimal modifications in the employees' benefits and protections in order to promote the reasonable likelihood of a successful rehabilitation of the debtor, by taking into account all of the circumstances facing the debtor and by balanciing the interests of the debtor, the creditors and other employees of the debtor; which balancing shall include the good faith efforts of the debtor to seek appropriate participation of such creditors and employees. The debtor shall provide the representatives information necessary to a fair evaluation of the proposal.

(2) During the period from the making of a proposal provided for in paragraph (1) of this subsection until the hearing provided for in subsection (d)(1) of this section, the debtor shall offer to meet at reasonable times and confer in good faith with the authorized representatives of the debtor's employees in an effort to reach mutually satisfactory modifications to the agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that the debtor has complied with the requirements of subsection (b) of this section and that, on balance, the equities weigh more heavily in favor of rejection of the collective bargaining agreement.

(d)(1) Upon the filing of an application for rejection, the court shall schedule a hearing, to be held not later than twenty-one days after the filing of such application, at which other interested parties may appear and be heard. Reasonable notice of such hearing shall be provided to such parties at least ten days in advance of the date set for the hearing. The court may extend such time for a period not exceeding seven days where the circumstances of the case require such extension in the interests of justice, or for such additional period of time as the parties may agree to.

(2) The court shall rule upon such application for rejection within thirty days of the date of the commencement of the hearing, or within such additional period of time that the parties may agree to. If the court has not issued its ruling within the time limits prescribed in this section, upon application by any party an appropriate reviewing court an automatic mandate shall issue from such reviewing court requiring the court below to issue its ruling within five days or face contempt of the order of the reviewing court. Any appeal from a ruling on an application for rejection shall be filed with the appropriate reviewing court within five days from the issuance of such ruling and the reviewing court shall rule upon such appeal within fifteen days of the time such appeal is filed. Such requirements shall apply to any and all successive appeals which may be filed at whatever stage.

(3) The court may enter such protective orders on [illegible] terms as are consistent with the authorized representative's need to evaluate the debtor's proposal for modifying the collective bargaining agreement and the debtor's application for rejection and as may be necessary to prevent public disclosure of information in the possession of the debtor, the disclosure of which may compromise the position of the debtor with respect to its competitors in the industry in which it is engaged. Upon motion of the debtor showing just cause, the court shall examine confidential information of the debtor that may be submitted to the court in connection with the application for rejection in camera. If the court finds, upon such examination, that such information is relevant to a fair evaluation of the application for rejection, it shall order the disclosure of such materials to the representative of the debtor's employees.

(e) No provision of this title shall be construed to permit a debtor in possession or trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement except in accordance with the provisions of this section.

SEC. _______. Section _ _____ shall be effective upon date of enactment.

The CHAIRMAN. Thank you. Mr. Lewis and Mr. Lorenzo, I have to apologize. I have a meeting I have to attend at 3:30 with the leadership that has just come up. Can you summarize?

Mr. LEWIS. I would be happy to take 7 or 8 minutes.

The CHAIRMAN. If you could do that, it would give me just about enough time to get over there. It is a top secret meeting, so I need to be there. This is one of those problems that just came up today. What I am going to have to do with Mr. Lorenzo is, I will have to recess until I get back, which will be, I hope, by 4:30. I want to take Mr. Lorenzo's testimony, perhaps above all testimony here today, although all of it is important.

Mr. Lewis, go ahead.

STATEMENT OF DANIEL M. LEWIS, ATTORNEY AT LAW, ARNOLD & PORTER, WASHINGTON, DC

Mr. LEWIS. Thank you, Mr. Chairman. I had an opportunity last night to prepare a written statement and ask that it be submitted for the record.

The CHAIRMAN. Without objection, so ordered.

Mr. LEWIS. I would like to address myself to two or three points which have not already been discussed at length already.

In appearing today, I represent no client and no group. I do bring a special perspective, as a debtor's counsel and a litigator. I represented Braniff Airways in its recent chapter II proceedings, and I would like to use that perspective to add some comments to the prior testimony before the committee.

First of all, I do not agree with many of the comments regarding the need for debtors to unilaterally reject or not observe the contract terms of labor contracts upon the filing of a chapter 11. This is not a practice that is engaged in routinely by debtors. Indeed, because of the potential liability, it was something that most debtors dared not try. It was only, I believe, in the Wilson proceeding of about 1½ years ago that any major bankrupt corporation in chapter 11 took the chance of utilizing this rather unique approach to contract rejection.

Since it has not been in law or practice that long, I am unconvinced that is an essential part of the arsenal of the debtor's power. I would take the position that if legislation can be devised—and I think it can—which gives the debtor the sight to have a rejection hearing promptly, then the ability to not house the contract teams prior to that hearing is not essential for the debtor. I say that as debtor's counsel. If you can get a contract rejection hearing within 30 or 60 days, it seems to me an extraordinary case where you would not have filed a petition in time, if you counseled your client correctly, to have adequate cash under the old labor agreement to operate that far.

I think unilateral contract rejection lends a great deal of instability to the whole reorganization process; it often leads to a threat of a strike, which in many cases would be death to a debtor; and it interferes with good-faith bargaining. So if a legislative compromise is being looked at, I would urge the committee to consider a very stringent requirement given the debtor an expedited hearing, if the debtor thinks that it is necessary, and combine that with a prohibition against unilateral rejection. I think that would be a reasonable compromise.

As to the rejection standard itself, I think the discussion today has been a little artificial. It separates the contract rejection proceeding from the entire chapter 11 proceeding, but this is just one little piece of the puzzle. I think it would be helpful to look at this issue from the point of view of the debtor who has just filed chapter 11. He is probably in a desperate and near-suicidal condition.

The debtor has to come up with a plan of operation which will take a bleeding company and make it a healthy company. Probably, in many cases, to do that, it has to lower wage rates. It probably also has to close plants, kill products, get rid of certain parts of the operation, chop overhead. But in many cases, it has to lower wage rates, and that is where the discussion has focused here.

But there are other reasons why labor rates have to be lowered. One, you need enough cash to get through the chapter 11. More importantly, in many cases and indeed in most cases, you have to provide capital for an operating company, and most people do not invest in companies that are in chapter 11. You only have two sources of such capital. You can get investment from the various constituents, an important one of which is labor. The other constituents are the secured creditors, the unsecured creditors, and equity. Or the debtor can go out and get an outside investment. For example, Braniff got a $70 million investment from the Hyatt people.

It is impossible to obtain concessions from the secured creditors and the unsecured creditors, and in many cases equity, and you do not have a prayer in the world of attracting outside capital, unless wage rates are lowered at the beginning of a chapter 11 to a competive level. If they are already at a competitive level, there is no need to lower that contract. But you must be able, at the beginning of a case, if your wage rates are not competitive, to lower those rates, because only then you can go out and ask for money. If you never get to ask for money until the end, it is too late; it is liquidation. So the decision on contract rejection has to come early.

Once you get concessions from labor, then you can go to the secured creditors and others. One thing that has been overlooked is that a plan of reorganization is, by and large, a consensual process. The creditor classes vote on the process. If you cannot get two-thirds of a vote in amount from all classes, your plan may be dead, unless you can use the cram-down provisions, which is very hard to do. So basically chapter 11 is a making-a-deal process; you have to get concessions from everyone. If the rejection standard is such that you do not get concessions from labor, you will not get the concessions from others, and you will die.

Because of this balancing process, my view is that the standard enunciated in the *Bildisco* case makes a great deal of sense. It is most sensitive to the goals of and the workings of the bankruptcy process. On the other hand, I do not agree that a standard that used language from the *REA Express* test would be death to debtor. There is too much emotional investment in the words that are being used here, because as a practical matter, when you are litigating this issue before a judge, it is going to be very difficult ever to reject a collective bargaining agreement unless you can make a very substantial case that without the rejection, things will go awry, and you will never confirm a plan.

I would, therefore, suggest that if the *Bildisco* language cannot be adopted—and I find that most preferable—then the language in the Rodino bill, the suggested section 1113, be modified to make it more acceptable. This may be another fruitful ground for compromise. My problem with that Rodino language is not as it relates to whether or not a plan will be successful. It is in the certainty, the use of the verb "will." As many other witnesses have pointed out, at the beginning of a chapter 11, you cannot prove as a certainty that you need lower wages to confirm a plan of reorganization because you are talking about events 12, 15, 17, or 18 months out. What you can prove, in many instances, from testimony of management and investment bankers, is that unless wages are reduced, the chances of attracting capital, the chances of making a profit, are very low.

So, if the Rodino bill were to read something like "the chances that reorganization are likely to be impossible" or "reorganization is likely to fail" or "probably will fail", that language would give maneuvering room for a debtor to put on a decent case at the beginning or a chapter 11 proceeding in appropriate circumstances. Maybe such a compromise that could end the logjam here, because I agree with Judge Mabey that there has been a lot of unnecessary emotion and political capital invested in certain words, because in most cases, when you get to trial before a bankruptcy judge or a district court judge, as the case may be, the magic words do not mean much. It is the force of the testimony and the evidence that means a lot.

Finally, I would like to address the question of whether companies can use chapter 11 as an abuse in order to get rid of labor contracts. I cannot speak to very small reorganizations, but my experience in large reorganizations is that this threat has not existed, does not exist, and under the *Bildisco* standard, will not exist. First, if you have to prove, to reject a contract, that it is necessary for your reorganization, then you have already filtered out bogus attempts at rejection for nonfinancial needs.

As was alluded to earlier, if a debtor goes into chapter 11, moves to reject the contract, and loses, the liabilities it may face—and the law is not clear on just what liabilities there are, but the potential liabilities it faces would in many cases be catastrophic.

The CHAIRMAN. Yes, they would be devastating. So you had better be right.

Mr. LEWIS. You had better be right. You would be out of your mind to do it under the chance that this would be a convenient way to lower labor rates.

Second, as was mentioned just a minute ago, you will probably be subject to a challenge as a good-faith filing, a motion to dismiss the filing of the chapter 11. The courts that have addressed this issue—in the *Continental* case and the *Manneville* case most particularly—have basically held if a debtor demonstrates that but for the filing, catastrophe of a financial nature is certain, whether in the near-term or long-term, there will be no real questions about its good faith. So you have that second hurdle to get over.

Third and most important, and surprisingly one that has not been mentioned in the press or in the testimony so far, is that from the perspective of management, when they are about to file Chapter 11, management will go forward only in desperation, both from a commercial point of view and from a personal point of view. Thus, it makes no sense to believe that management will act casually.

And that is important, because as soon as you file that chapter 11, the cost of running a bankruptcy involves millions of dollars lost to lawyers. It is good for the lawyers; it is not good for the company. Second, your customers, your creditors, your suppliers, everybody who deals with you is immediately bitter, and those relationships may never be mended. Third, in many instances, immediately there is a motion to appoint a trustee. Management can get fired. Indeed, in the long run, when a plan of reorganization is put together, one of the prices often paid to obtain secured creditors' support and labor support, is throwing out old management, whether or not they had anything to do with the financial disaster. So most business executives—although this is not always true—risk losing their jobs.

Finally, everything you do is going to be second-guessed by the bankruptcy judge and bitterly attacked by some of the creditors. You share power. One day you are running a business, and the next day you are running a balkanized negotiating process over the most simple business decisions. For a businessman trying to run a company, it is hell on wheels. It is nearly impossible to do.

And finally, as I said before, getting a plan of reorganization adopted is a consentual process, and everybody may not agree. There is no guarantee they will agree. Outside economic factors or political factors may be such that there is no agreement, and if there is no agreement, there is only one alternative, and that is liquidation: The death of the company. We are seeing in the *Manneville* case the possibility of this occurring, because the asbestos plaintiff litigants may not reach an agreement with the company, and that company may not be able to reorganize, and will have to liquidate.

For all of those reasons, Mr. Chairman, I do not think it makes sense to believe that management, even if advised on the most cursory level, would go into chapter 11 unless that was their only choice but for liquidation. So I do not believe that abuse of a chapter 11 has labor reasons is a serious problem. I do think that the rejection standard in the House bill is too tight, but it could be loosened up without going all the way to the *Bildisco* to be workable both for management and for labor and to operate in a way which will encourage good-faith bargaining. And finally, I think it makes sense to consider eliminating the power to unilaterally reject the labor contract conditions upon filing, if an expedited hearing on rejection can be guaranteed to the debtor.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Lewis follows:]

TESTIMONY OF DANIEL M. LEWIS, ESQ.
BEFORE THE SENATE JUDICIARY COMMITTEE AND THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES REGARDING LEGISLATION CONCERNING THE REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN CHAPTER 11 REORGANIZATION PROCEEDINGS
APRIL 10, 1984

Messrs. Chairmen and Committee Members:

It is a pleasure to appear before you today, in response to your invitation to comment on the legislation pending before Congress regarding the appropriate standards for the rejection of collective bargaining agreements for corporations undergoing reorganization in Chapter 11 proceedings.

I am not appearing before you on behalf of any client, but simply as a bankruptcy practitioner who is a partner at the law firm of Arnold & Porter. I do approach this issue from the perspective of an attorney who has represented debtors, and in particular, represented Braniff Airways Incorporated in its recent, successful reorganization proceeding.

I hope to approach the question before you from a very practical point of view: From the perspective of a company that has just initiated Chapter 11 proceedings and hopes to achieve a successful reorganization, what kind of standard makes sense for rejecting a labor agreement, given the legitimate interests of the debtor, its labor unions, and other parties such as creditors and equity holders?

The Context of Contract Rejection

To begin, I think it is important to note that contract rejection under Section 365 of the Bankruptcy Code is one of the many tools -- although a very crucial tool -- available to a debtor once it begins a Chapter 11 reorganization. These tools, granted by Chapter 11, constitute a broad grant of rights and privileges which normal parties, outside of a bankruptcy, do not have. Thus, for example, the debtor in reorganization need not pay its trade creditors, need not pay interest to its secured creditors, cannot, without court permission, be sued and, as we all know, under Section 365 of the Bankruptcy Code, can repudiate its contractual obligations with Bankruptcy Court approval.

It must be remembered that these special privileges are granted to the debtor because the debtor needs extraordinary powers in order to avoid liquidation. The Bankruptcy Code bestows these powers on the debtor because reorganization is viewed as better than liquidation, for all parties involved, including the debtor's employees. To the extent these powers are limited, the chances of successful reorganization are correspondingly limited.

It also should not be forgotten that a successful reorganization usually depends upon sacrifices by all parties. For example, trade creditors are often not paid for months or years, and when they are paid, they often receive only a small percentage of their claims. Equity holders very often are effectively wiped out, or usually severely diluted. Secured creditors often lost interest on their loans for long periods of time, and typically receive a return on their loans of well below 100 cents on the dollar. To the extent labor contract rejection takes place, the debtor's future employees also contribute to these sacrifices necessary for reorganization.

The terms of the participation by labor unions in the process of negotiating these sacrifices is governed by the standard by which labor union contracts can be rejected by the debtor. I think almost all parties would agree, and I certainly agree, that collective bargaining agreements are not routine contracts of the debtor, and they should not be treated as contracts which can be rejected under the ordinary "business judgment" test, so long as the bankruptcy court finds that they are burdensome to the debtor.

In fact, the special status given to collective bargaining agreements under the National Labor Relations Act (or the Railway Labor Act) makes it clear that modification of these contracts, even in the Chapter 11 reorganization proceeding, must be undertaken only if a higher standard can be met, because these contracts and the process by which they have been negotiated are so important.

The issue of what standard should be used to permit labor contract rejection has, of course, been precipitated by the Supreme Court's February 22, 1984 decision in National Labor Relations Board v. Bildisco & Bildisco, ___ U.S. ___ (1984), which affirmed the Third Circuit's prior enunciation of a standard allowing rejection if a debtor generally demonstrates that the collective bargaining agreement in question burdens the estate and that the equities balance in favor of rejecting the contract. By so doing, the Supreme Court rejected the test adopted earlier by the Second Circuit in Brotherhood of Railway and Airline Clerks v. REA Express, Inc., 523 F.2d 164, cert. denied, 423 U.S. 1017 (1975) ("REA Express"), which generally required that such agreements be rejected only if the rejection was necessary to a successful reorganization. And, as the Committee is aware, the Supreme Court went a step further in Bildisco, holding that a debtor did not commit an unfair labor practice if, prior to approval of a rejection by the Bankruptcy Court, the debtor unilaterally abrogated the terms of its labor contract and instituted new wage rates and terms and conditions of employment.

What would the effect be on the prospects of a company in reorganization if the Bildisco decision were overturned, as proposed in Subtitle C of H.R.5174 and similar legislation?

Pre-Rejection Contract Change

How important is it for a debtor to be able to unilaterally institute new wages and new terms and conditions of employment prior to the time that a Bankruptcy Court decides that it is proper to reject a collective bargaining agreement? From my experience, the answer is that this authority is, in most cases, not important to the debtor. As already provided in Section 365 of the Bankruptcy Code, there is ample authority for a debtor to move for an expedited hearing on contract rejection. I note that the legislation being proposed regarding Bildisco provides for a mandated expedited hearing on contract rejection.

I think it is important to provide the debtor an opportunity for an expedited hearing on contract rejection if economics make this an essential. But such a hearing should not be held on an expedited basis if it would be premature.

If this flexibility to move fast when necessary is provided to the debtor, then there is no great need for unilateral termination of a contract prior to an expedited contract rejection hearing. The only harm which a debtor may suffer in the short interim is paying wage rates or utilizing working terms and conditions which may be too high for continued operations in reorganization proceedings. But an expedited hearing would limit any such harm. (Of course, there may be extreme cases in which a hearing on contract rejection may be delayed, and in which a delay in rejection would impose a severe burden on the debtor in possession, but these unusual circumstances can be handled under the equitable, discretionary authority granted to the Bankruptcy Court.)

At the same time, by not permitting unilateral rejection, stability is preserved in the relationship between the debtor and the unions, and the possible disruption to that relationship and to good faith negotiations concerning its modification would be avoided.

The fact of the matter is that prior to the Wilson Foods and Continental Chapter 11 filings, unilateral rejection was not widely used by debtors, since the possible liabilities to the estate could have been severe. By preventing such unilateral changes, the status quo ante would be restored, and this makes good sense.

Standard for Contract Rejection

As to the second Bildisco issue -- what the standard of contract rejection should be -- I think it first merits looking at the Chapter 11 reorganization process, to examine the role that contract rejection actually plays in a reorganization, before deciding on what standard makes sense.

It cannot be overemphasized that in a reorganization proceeding, the major task of the debtor is to piece together, through negotiations, a plan of reorganization. This means not only formulating a business plan that will make sense and will allow the reorganized company to emerge from reorganization and eventually make a profit, but also and more importantly, to obtain consensual agreement to such a plan. The major parties in these negotiations -- the debtor, its secured creditors, its trade creditors, its employees, and its equity holders -- all play a role in these negotiations. These negotiations first must obtain adequate concessions from each one of these groups in order to allow a feasible plan of reorganization to be assembled and then, through the Chapter 11 voting process, obtain approval of each one of these groups by a two-thirds' majority vote.

While the Bankruptcy Code, through its complex "cramdown" provisions, permits approval of a plan over the objections of a class, the difficulty of achieving a successful cramdown makes its use extraordinarily rare. Therefore, consensus on a plan of reorganization and its sacrifices is a de facto necessity before a plan can be approved.

While attempting to achieve this consensus, the debtor must assemble a company that can, in fact, resume profitable operations. In many cases, this means a very substantial if not drastic lowering of operating costs. Often this involves elimination of unprofitable divisions, plants, products, or businesses. In many cases, it means sharp reductions in overhead costs, and sharp reductions in operating costs including wages. A standard which made contract rejection unreachable in many cases would obviously prevent this readjustment in operating costs, and doom reorganizations upon which such a readjustment was necessary. Thus, contract rejection is often a necessary prerequisite to a feasible reorganization plan.

Just as important, the debtor must be assembling the capital necessary to finance the operations of the reorganized company. This can be done in two ways. First, forgiveness of debt and other sacrifices from all the constituent groups in the reorganization is always required. Second, often a substantial investment from a third party is necessary. If reduction in wages is a precondition to a reasonable chance for profitable operations, unless these reductions are in place, outside investment will not be made, nor will the other groups to a reorganization likely to be willing to make sacrifices.

Therefore, in many cases, it is necessary to change wage rates of a debtor relatively early in the reorganization process. A successful contract rejection is often essential before the debtor can tie down commitments for investment, or for consensual concessions by the secured creditors and other parties.

Thus, it is important to have a contract rejection standard which can be applied meaningfully relatively early in the reorganization process, and one that can successfully be met when a reduction in wages is an economic prerequisite for successful reorganization.

I believe that it is just these considerations of mutual sacrifice among all parties, as well as the practical necessity of obtaining changes in collective bargaining agreements during the reorganization process, that the Supreme Court referred to in the Bildisco decision when discussing the "balancing of the interests" of the affected parties, and the need to reject a contract if the failure to do so "would impede the success" of the debtor's reorganization.

From this discussion it is clear that I am quite comfortable with the standards of contract rejection enunciated by the Supreme Court in Bildisco. However, in my view, a careful and reasonable reading of the standard in

REA Express which was restated several times in alternative language, does not yield a dramatically different result, since that standard basically required a showing that rejection was a prerequisite to the likelihood of a successful reorganization.

Let me put this in a more practical context. As a litigator for a debtor, I would certainly advise my client that, even under Bildisco, the chances of rejecting a collective bargaining agreement are very slim unless the debtor can demonstrate that, absent that rejection, a successful reorganization was highly unlikely.

Nonetheless, I think some of the legislation pending before you which purports to overturn Bildisco and replace it with the REA Express standard would prove to be quite harmful. The basic problem with these proposals, in my view, is that, although they purport to be enacting into statutory form the REA Express standard, they go well beyond that goal. For example, Subsection (g) of the proposed new Section 1113 of the Code in H.R.5171 would provide that the bankruptcy court could not approve the rejection of a collective bargaining agreement unless "absent rejection of such agreement, the jobs covered by the agreement will be lost and any financial reorganization of the debtor will fail."

I have two serious problems with this standard. First is the use of the verb "will," which implies a degree of certainty which may be impossible to meet, particularly at the beginning of a Chapter 11 case. Under such language, it could reasonably be argued that, until the debtor attempts to reorganize without the rejection of the contracts, it cannot be proven with a certainty that absent rejection, all reorganization attempts will fail. Therefore, rejection relatively early in the case would be unavailable, even if the debtor could prove that without rejection reorganization would probably be impossible. If in fact the court requires the debtor to go through the process of attempting to reorganize absent rejection, chances of reorganization will probably be lost, and liquidation would ensue.

I suggest that any such standard be modified to reflect a realistic factor of probability. For example, I would recommend the terms "will probably fail" or "will be likely to fail." Such a standard would require that the debtor demonstrate that, absent rejection, the chances for reorganization appear to be unlikely and the changing of wage rates appear to be necessary to attract the additional capital and other types of constituent support necessary to make reorganization feasible.

My second objection to the language as presently drafted is the use of the term "any financial reorganization" since, if read literally, this provision holds that a rejection is not proper if a very small and limited reorganization is possible, even if such reorganization is a far cry from that which would be available with contract rejection.

Under such a situation, it does not make sense to force a debtor to accept a limited reorganization if, by modifying wage rates, a reorganization of much larger scope is feasible. Obviously, a larger reorganization serves not only creditors, but also employees.

In conclusion, while I think the Bildisco standard would make most sense from the perspective of the debtor, if Congress decides to replace that standard, I recommend modification of the present proposed legislation, as discussed above, to more accurately reflect the dynamic needs of a reorganization as well as the actual holdings in the REA Express case.

Abuse of Contract Rejection

I have one final comment regarding the potential abuse of a reorganization proceeding in an attempt to improperly and unfairly change the results of collective bargaining. Certainly one can understand the concern of labor organizations regarding this issue. And any actual abuse of the bankruptcy process solely to undo collective bargaining agreements is not appropriate.

However, I do not think that bankruptcy law permits such an abuse now, and the Bildisco standard or enactment of the type of standard I recommend above for contract rejection would not provide an opportunity for such abuse.

There are three reasons I do not think the potential for such abuse exists.

First, under any verbal formulation of the contract rejection standard, a debtor is going to have to prove that, absent rejection of a collective bargaining agreement, reorganization is going to be quite unlikely or perhaps impossible. Such a standard cannot be met by a company which is financially healthy, and seeks only to increase profits by reducing its labor costs.

Second, the bankruptcy courts have begun rendering decisions regarding whether filings under Chapter 11 have been made in good faith, such as the recent decisions in Continental and in Manville. It is clear that the courts are requiring that debtors demonstrate that a Chapter 11 filing was necessary in order to avoid almost certain financial disaster. In certain cases that disaster may be in the near term, in others it may be far off, as in the Manville case. But in both cases, a debtor will have to prove that, but for the Chapter 11 filing, its prospects of continued survival were extraordinarily bleak, and it faced the real threat of liquidation. This standard will preclude improper filings.

Third, and a factor surprisingly not discussed in news articles and literature on this issue, is the very real threat which a Chapter 11 filing represents to a company and its management even under the best of circumstances. Any management group which examines a Chapter 11 alternative, even in a cursory manner, will find its risks are formidable. First, it is extraordinarily expensive. Second, relationships with trade creditors, customers, secured creditors and other financial institutions are often irreparably severed. Third, under a variety of circumstances, management can quickly be thrown out. Also, it is not unusual, as a concession as part of a plan of reorganization, to have old management replaced. Fourth, the operations of the company and its most secret financial details will be made public, or at least given to the company's labor leaders, unsecured creditors, secured creditors, and others. Fifth, all but the most routine decisions of the company must be approved by the bankruptcy court, diluting and sharing management control.

Finally, the reorganization process is, as discussed above, highly consensual and subject to failure. A number of factors may make the reaching of such a consensus impossible, in which case reorganization is not achievable and the only available alternative is liquidation. In the best of circumstances, reorganization is a highly risky undertaking, and there can be no assurances that the company which files a Chapter 11 petition will not, within a year or two, cease to exist.

Faced with these costs and risks, it is unlikely that management would file a Chapter 11 petition unless its only alternative to such a filing were the near certainty of financial collapse. This has been the case to date in the major reorganizations about which there has been so much publicity, and I believe that it will continue to be the case.

For these reasons, the threat of an abuse of the reorganization process solely in order to undermine collective bargaining agreements is not, in my view, real.

The CHAIRMAN. Thank you. Judge Mabey, I understand you have to catch a 6:15 p.m. plane?

Judge MABEY. Five thirty-five.

The CHAIRMAN. I would like to ask you all some questions. Let me ask you one, and then I will submit some in writing. If you can get them back to us so we have them by Friday, I will be very appreciative.

You mentioned that an interim decision might be appropriately followed by an ultimate decision on whether to reject the collective bargaining agreement. I presume that you are proposing to allow the court to make some modifications in the collective bargaining agreement which will stay in force until the rejection decision is made, maybe several weeks or even months later. What standard do you have in mind that would govern the interim decision, and then finally the rejection decision?

Judge MABEY. My suggestion is based upon my brainstorming, as it were, with myself as to what alternatives there might be to get out of this blind alley. That is one of them. Senator Specter seemed to discuss aspects of that. It is a novel idea to me. It would need to be explored carefully, and I am not sure what standard it would be, except it seems to me that one would draw some analogy to the temporary restraining order, preliminary injunction hearings in order to reach some immediate conclusion. It may be that the problem is solved, as Mr. Lewis suggests, by simply getting an expedited hearing very promptly and lowering the ultimate standard so that the court can look into the future and make a prognostication without a finding that it will or will not succeed but it is likely to or not to succeed.

The CHAIRMAN. I have a number of other questions, but I do need to be at this particular meeting. I think what I will do is submit questions to both of you other witnesses here today. I really have some personal ones I would like to ask you, but I can call you and ask you for your advice on some of those. I will submit some formal questions so we will have them for the record, if I can.

Mr. MINKEL. Senator, may I supplement my statement with a memorandum which was prepared for the National Bankruptcy Conference on the jurisdiction and venue provisions?

The CHAIRMAN. Without objection, we will put it in the record at this point.

[The following material was subsequently supplied for the record:]

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April 11, 1984

EXPRESS MAIL

The Honorable Orrin G. Hatch
SR-135 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I very much appreciated the opportunity to appear and testify before the joint hearings of the Senate Judiciary and Labor Committees on April 10.

It was somewhat disturbing but not surprising that the representatives of the Teamsters, AFL-CIO, Chamber of Commerce, National Association of Manufacturers, and other business representatives either misunderstood or mistated the legal issues relating to the Bildisco case. The following is a summary of the points which we made in our testimony on behalf of the National Bankruptcy Conference:

1. The Bankruptcy Reform Act of 1978 did not change the law with respect to collective bargaining agreements.

2. REA Express held that rejection was proper only in cases where it could be demonstrated that rejection was essential to an effective reorganization. REA Express was not the general rule prior to Bildisco. REA Express was the rule in the Second Circuit, but each of the other Circuits which considered the issue of the appropriate standard for rejection subsequent to REA Express

adopted the "balance of equities" standard which the Supreme Court unanimously affirmed in Bildisco.

Whatever standard is adopted should be flexible enough to insure that a contract can be rejected in a liquidating chapter 11 and that contracts governing one or more plants or divisions which are being liquidated or closed, may be terminated notwithstanding the fact that the debtor will reorganize by recapitalization or by the acquisition of the remaining assets by a third party.

3. Applications for rejection of collective bargaining agreements are very much the exception rather than the rule in chapter 11 cases. In most cases, collective bargaining agreements are not an issue. Either a contract is not burdensome, or if burdensome, the contract is renegotiated. There are three exceptions -

(i) Occasionally, a debtor which does not need financial reorganization, files a petition solely to reject a collective bargaining agreement. This is a "bad faith" filing which can and should be dismissed pursuant to 11 U.S.C. § 1112. There is no need for a new section 1113 to deal with this problem;

(ii) A union may care more about enforcing a uniform national contract than negotiating modifications in good faith. In such cases, an employer has to seek protection under the Bankruptcy Code and make application for rejection of the contract in order to survive; and

(iii) A debtor may have financial problems and labor problems which are not resolved by negotiations. If the debtor files and seeks rejection of the contract, the standard for rejection will be important. But this is the exceptional case.

4. The AFL-CIO testified that in 19 of 22 cases where applications were filed to reject collective bargaining agreements, the court found that the REA Express standard was satisfied. This suggests that companies file chapter 11 because they have severe financial difficulties and generally can establish that relief from a collective bargaining agreement is necessary for their survival. This, however, does not support the adoption of the REA Express standard. That standard is potentially

unfair to non-union employees and to employees of bargaining units who are willing to agree to contract modifications. It allows a dissident union to argue that rejection is not necessary because the debtor can be reorganized notwithstanding the fact that such reorganization is made possible by the concessions made by non-union employees and by other collective bargaining units. The REA Express standard makes it very difficult to get consensual amendments in cases where one collective bargaining unit is afraid to agree to modifications since another collective bargaining unit may hide behind the REA Express standard.

5. While the National Bankruptcy Conference supports the balancing of the equities standard, the Conference also supports reversal of that part of Bildisco which permits a debtor to unilaterally negate the terms of a contract prior to the hearing on rejection. If, however, an employer must comply with the contract pending rejection, a procedure must be adopted for the accelerated determination of the application. If the trial court finds that the contract may be rejected and if an appeal is taken, the employer should not be required to fulfill the terms of the contract while the appeal is pending unless the debtor is protected. Such protection could be in the form of a bond in an amount to be determined by the court. In any event, amounts paid under the contract subsequent to entry of a rejection order should be an offset against amounts due to employees under a plan or in liquidation.

6. Under chapter 11, a reorganization can be effected through rehabilitation or through liquidation. Should the Senate pass a bankruptcy bill which includes a new section 1113, the language of the section or the legislative history should make it clear that collective bargaining agreements may be rejected in liquidating chapter 11 cases. If the contract cannot be rejected by reason of section 1113, creditors will convert the case to chapter 7, in which rejection is automatic. Such a result, in certain cases, would be extremely harmful to employees and retirees under the collective bargaining agreement. For example, the employees and retirees of White Motor Corporation had an extremely generous medical plan. The creditors permitted the debtor to continue to pay medical expenses of employees and retirees subsequent to the filing date with the understanding that the amount of benefits paid would be deducted from the amount which employees would be entitled to receive under the plan by reason of the termination of their contract.

The debtor, the creditors' committee and the UAW negotiated over a period of many months a plan which permitted a major medical insurance program to be established which protected the former employees and retirees from financial ruin by reason of major medical costs, while substantially reducing benfits for minor items. This could not have been achieved in chapter 7. In chapter 7, each employee, retiree, spouse and dependent minor would have had to file an individual proof of claim. Since the value to each individual of vested life time medical benefits would have been highly speculative, the claimants would have had great difficulty proving their individual claims in the case. Since any chapter 7 case would have been significantly delayed by reason of thousands of contested proofs of claim, the beneficiaries would have had neither insurance nor distributions.

7. Any new provision of the Bankruptcy Code addressing the duty to bargain or the duty to provide information should be in accord with the National Labor Relations Act. Thus, an employer should not have the duty to bargain or duty to provide information in circumstances where the debtor would not be under these duties outside of chapter 11.

8. In considering the time period necessary to resolve the issue of rejection, the Senate should focus its attention on the extremely complicated jurisdiction and venue provisions of the proposed Senate bill. If the bill is adopted as drafted, the resolution of the rejection issue will take significantly longer than it does under the present system (i.e. the Emergency Rule). We very much appreciate your allowing us to supplement our statement with an analysis of the jurisdiction and venue provisions of the Senate Amendment. Enclosed is a copy of that analysis, which was prepared for the Legislation Committee of the National Bankruptcy Conference.

When section 1113 first surfaced in the House, Professor Lawrence P. King wrote a letter to Congressman Rodino with a revised draft of the House Amendments. A copy of Professor King's letter and the proposed redraft is enclosed.

The issue of the proper treatment of collective bargaining agreements in bankruptcy is a complicated one. Attempting to create new standards within the time frame in which the Senate has been working is very dangerous. One is reminded of a favorite admonition of law professors: "Hard cases make bad law." I hope that the Senate reflects on this before adopting a new section 1113.

Once again, I wish to express my appreciation for the opportunity to have addressed the Judiciary and Labor Committees on these issues.

Very truly yours,

H. P. Minkel Jr.

H. P. Minkel, Jr.

HPM:ka
enc.

NATIONAL BANKRUPTCY CONFERENCE
(A voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration.)

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APR - 4 1984
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New York University
School of Law
40 Washington Square South
New York, NY 10012

March 15, 1984

Honorable Peter W. Rodino
Chairman, House Judiciary Committee
Rayburn House Office Building
Washington, D.C. 20515

Re: Treatment of Collective Bargaining
Agreements in the Bankruptcy Code

Dear Chairman Rodino:

The National Bankruptcy Conference, at its meeting on February 29, 1984, considered H. R. _______ introduced by you to amend the Bankruptcy Code with respect to its treatment of collective bargaining agreements. The Conference believes the bill, if enacted, could have an extremely adverse effect on the efforts of companies to reorganize under chapter 11 of the Code and would make it impossible for some companies to reorganize. The main provision of the bill that would have this effect is contained in subsection (f) rendering all claims arising as a result of a rejection of a collective bargaining agreement entitled to administrative expense priority. Such claims can be extremely large in amount and being thus entitled to a first priority would have to be paid in full, a normally impossible task to perform. Such claims should instead be treated as claims arising from rejection of all other executory contracts, i.e., they should fall within § 365(g) of the Code and considered as prepetition claims.

Attached hereto is a draft bill prepared by The National Bankruptcy Conference. It contains the following provisions:

1. The standard for rejecting collective bargaining agreements is set forth to codify the rule of the Bildisco case (National Labor Relations Board v. Bildisco, ____ U.S. ______ (1983)). It would permit rejection if the court finds that, on a balancing of the equities, the need for rejection outweighs the burdens of assumption. The Conference fears that a stricter standard would be difficult, if not impossible to apply in a chapter 11 case, particularly in the early stages.

2. Paragraph (1) of the new subsection provides that a collective bargaining agreement may not be rejected after a petition under the Code is filed until there has been a final hearing by the court and the trustee has demonstrated the necessity for rejection. Paragraph (2) provides that during the first 30 days after the trustee has sought rejection, the agreement is continued in effect pending the final hearing. After such 30 day period the agreement is deemed not to be in effect provided that such 30 day period may be extended by the court upon request by the union unless there is a reasonable likelihood that the trustee will prevail at the final hearing on the request for rejection. Extension of the 30 day period may be obtained by the union at a preliminary hearing which will permit both parties an opportunity quickly to set before the court the immediate needs or lack of emergency existing under the circumstances of the case. Paragraph (3) provides that during such 30 day period or any extension thereof, the trustee may not implement any changes in the terms, conditions, wages, benefits or work rules under the agreement except in an emergency situation when necessary to operate or preserve the business, and then only after notice to the union and authorization by the court after a hearing. The concept and language are taken essentially from §§ 362(d) and (e) which concern requests for relief from the automatic stay.

3. The attached would amend § 365 rather than chapter 11. Thus, it would be applicable in chapters 9 and 13 cases as well. A caveat is offered, however, that if the standard

for rejection is changed to a stricter one, the amendment should not apply in chapter 9 cases; it just would not be feasible in those cases.

4. The attached is made applicable to cases commenced after its enactment date. The Conference believes it should not apply in pending cases.

5. The Committee Report should mention that the omission of any contrary provision in the amendment means that § 365(g) applies if a court approves rejection.

The Conference urges that the attached be introduced and seriously considered by the Judiciary Committee in place of your bill. For the reorganization process to function properly, it is essential that a delicate balance between and among the key participants be maintained. The attached proposal seeks to accomplish that result.

Sincerely,

Lawrence P. King per L. [illegible]

Lawrence P. King

A Bill

to amend title 11 of the United States Code to clarify the circumstances under which collective bargaining agreements may be rejected in cases under such title.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That:

Sec. 1. Section 365 of title 11, United States Code, is amended by inserting after subsection (k) the following new subsection:

(1) In a case under chapter 9, 11 or 13 of this title --

"(1) The trustee, after notice and a hearing, may assume or reject a collective bargaining agreement which has been made by the debtor under the authority of title II of the Railway Labor Act, the National Labor Relations Act, or other applicable law. A collective bargaining agreement shall be rejected under this section upon the request of the trustee if the court finds that reasonable efforts to negotiate a change in the contractual terms have been made by the debtor or by the trustee and are not likely to produce a prompt and feasible alternative to rejection, that the inability to reach an agreement threatens to impede the success of the debtor's reorganization under chapter 11 of this title or adjustment of debts under chapter 9 or 13 of this title, that the agreement is burdensome to the estate, and that in considering the needs of the debtor, the employees covered by the agreement, and other parties in interest, the equities balance in favor of the rejection of the agreement.

"(2) Thirty days after a request by the trustee under paragraph (1) of this subsection, the collective bargaining agreement shall be deemed not to be in effect pending a final hearing and determination under paragraph (1) of this subsection unless the court, after notice and a hearing, orders the agreement continued in effect pending such final hearing and determination. A hearing under this paragraph may be a preliminary hearing, or may be consolidated with the final hearing under paragraph (1) of this subsection. If the hearing under this paragraph is a preliminary hearing -

(A) the court shall order that such agreement shall not be continued in effect if there is a reasonable likelihood that the trustee will prevail at the final hearing under paragraph (1) of this subsection; and

(B) the final hearing shall be commenced within thirty days after such preliminary hearing.

"(3) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in the case of a municipality to the continuation of necessary services, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement changes in the terms, conditions, wages, benefits or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee."

Sec. 2. The amendments made by this Act shall apply in cases commenced under title 11 of the United States Code on and after the enactment of this Act.

NATIONAL BANKRUPTCY CONFERENCE

(A voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration.)

May 7, 1984

FEDERAL EXPRESS

The Honorable Strom Thurmond
SR-218 Russell Senate Office Building
Washington, D.C. 20510

Re: Treatment of Collective Bargaining
Agreements under the Bankruptcy Code

Dear Senator Thurmond:

On April 11, 1984, I sent you a summary of my testimony in connection with the joint hearings of the Senate Judiciary and Labor Committees concerning the above-referenced subject. Enclosed with my letter was a copy of a draft bill prepared by The National Bankruptcy Conference. The following is an explanation of the provisions of the Conference's proposal:

1. The NBC bill would amend section 365 by adding a new subsection (k). This subsection would be applicable to chapter 9, 11 and 13 cases.[1]

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[1] Section 901(a) makes section 365 applicable to chapter 9 municipal reorganizations. Section 903 of Title 11 provides that chapter 9 "does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality. . . ."

Section 904 provides that: "Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decreee, in the case or otherwise, interfere with -

(1) any of the political or governmental powers of the debtor;

(2) any of the property or revenues of the debtor; or

(3) the debtor's use or enjoyment of any income-producing property."

2. The proposed section 365(k)(1) adopts the standard for rejecting collective bargaining agreements which was adopted by the Supreme Court in National Labor Relations Board v. Bildisco & Bildisco, ___ U.S. ___, 104 S. Ct. 1188 (1984). In essence, it would permit rejection if the court finds that the contract is burdensome and, after a balancing of the equities, the need for rejection outweighs the burdens of assumption. For reasons set forth in greater detail in paragraph 6 of this letter, the Conference believes that the stricter standard adopted by the Second Circuit in Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975), is difficult, if not impossible to apply in reorganization cases, particularly in the early stages when the issue is apt to be raised. The Conference also believes that the standard can produce inequitable results in the context of debtors with multiple operations or multiple collective bargaining units where a majority of employees or their unions are willing to make concessions. Proposed section 365(k)(1) includes minimum conditions precedent to rejection, namely, the court must find that the debtor or trustee has made reasonable efforts to negotiate contractual modifications, that such efforts have failed or are likely to fail, and that the failure to modify the contracts threatens to impede the success of the debtor's reorganization.

3. The Conference's proposal would reverse that part of the Bildisco decision which permits the debtor to take unilateral action contrary to the collective bargaining agreement subsequent to entry of an order for relief and prior to court approval of the application for rejection. The Conference felt, however, that a debtor should be required to comply with the terms of its collective bargaining agreements after entry of the order for relief only if there was an effective mechanism for (i) emergency relief where performance would jeopardize rehabilitation efforts and (ii) prompt adjudication of the issues presented by an application to reject. In addition, the Conference felt that relief from the contract should be automatically granted if the court does not hear and/or determine the rejection application promptly.

Pargaraph (2) provides that during the first 30 days after the trustee has sought rejection, the agreement is continued in effect pending the final hearing. After such 30-day period, the agreement is deemed not to be in effect provided that such 30-day period may be extended by the court upon request by the union unless there is a reasonable likelihood that the trustee will prevail at the final hearing on the request for rejection. Extension of the 30-day period may be obtained by the union at a preliminary hearing which will permit both parties an opportunity quickly to set before the court the immediate needs or lack of emergency existing under the circumstances of the case. Paragraph (3) provides that during such 30-day period or an extension thereof, the trustee may not implement any changes in the terms, conditions, wages, benefits or work rules under the agreement except in an emergency situation when changes are necessary to operate or preserve the business, and then only after notice to the union and authorization by the court after a hearing. The concept and language are taken essentially from §§ 362(d) and (e) which concern requests for relief from the automatic stay.

4. Section (2) of the proposed bill provides that the amendment of section 365 is applicable to cases commenced after the enactment of the amendment. The Conference believes it should not apply in pending cases.

5. The Committee Report or floor statement accompanying the amendment should mention that the omission of any contrary provision in the amendment means that section 365(g) applies if the court approves rejection. Therefore, if the contract has been assumed under section 365 or under a plan confirmed in a chapter 9, 11 or 13 case, rejection of the contract constitutes a breach of such contract immediately before the filing date and thus, damages arising by reason of such rejection are prepetition claims.

6. As you are aware, on July 24, 1975, the Second Circuit decided Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975). The court held that a collective bargaining agreement is an executory contract and could be rejected in a case under Chapter XI of the Bankruptcy Act. The court also also held that the determination of whether a collective bargaining agreement could be rejected should not be determined solely on the basis of whether rejection will improve the financial status of the debtor. The court cited with approval, In re Overseas National Airways, Inc., 238 F. Supp 359, 361-362 (E.D.N.Y. 1965), that the bankruptcy court should permit rejection of a collective bargaining agreement

> "only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under a collective bargaining agreement, it may be depriving the employees affected of their senior-

ity, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors." 519 F.2d 707.

One month later, a different Second Circuit panel decided *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*, *supra*. The Second Circuit held that executory collective bargaining agreements subject to the provisions of the Railway Labor Act ("RLA") could be rejected in a Chapter XI case where, "after careful weighing of all of the factors and equities involved, including the interests sought to be protected by the RLA, a district court concludes that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse. . . ." 523 F.2d 169. The court followed the analysis of *Kevin Steel Products* that the debtor was a new juridical entity and thus was not a party to and was not bound by the terms of the collective bargaining agreement entered into prior to the filing date.[2] The court further noted that, although a debtor-in-possession, REA was not bound to assume the collective bargaining agreement of its predecessor. As a new employer, however, it was obligated to bargain collectively with the representatives of its employees. 523 F.2d 170. Following NLRB v. Burns Int'l. Security Services, Inc., 406 U.S. 272 (1972), the court noted that although the debtor-in-possession, as a successor employer, had a duty to bargain collectively, "it had no obligation to refrain from changing the terms of employment before such bargaining occurred." The holding of the Supreme Court in NLRB v. Burns Int'l. Security Services, Inc. as articulated by the Second Circuit in REA Express is interesting:

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[2] In *REA Express*, the Second Circuit suggests that a contract may be assumed either expressly or by conforming to its terms without disaffirmance, citing *Burke v. Morphy*, 109 F.2d 572 (2d Cir.), *cert. denied*, 310 U.S. 635 (1940). Section 365(a) requires court approval for the assumption of an executory contract. This provision insures that creditors will have an opportunity to be heard in the event that the debtor chooses to assume the contract. This is particularly important since once a contract has been assumed, damages arising by reason of the subsequent breach of the contract or rejection of the contract in a subsequent liquidation case, are entitled to priority under section 507(a)(1) as administrative expenses. Under no set of circumstances, should the debtor or trustee be bound by an executory collective bargaining agreement by reason of complying with the terms of such agreement prior to filing an application to reject. Any statutory change should be accompanied by legislative history which makes it clear that a contract may be assumed only by court order and that complying with the contract pending rejection does not change the priority of claims arising by reason of breach of the contract.

> "As a new employer, Burns was held to have a right unilaterally to set the initial terms on which it would hire employees. Moreover, the Court stated, to bind a successor-employer to the terms of its predecessor's collective bargaining contract could, where the terms of the agreement were onerous, discourage or inhibit a potential successor from taking over a failing business. Thus a new employer, it was emphasized, must be granted certain prerogatives at the outset in making changes in the method of operation, business structure and labor arrangements of a venture. Otherwise, the free flow of capital and efforts to revive or expand a weak enterprise might be frustrated.
>
> These principles are particularly applicable to the efforts of a trustee or debtor-in-possession to save a carrier from complete collapse or liquidation. Unless the debtor-in-possession is permitted to act promptly, albeit unilaterally, in avoiding onerous employment terms that will prevent it from continuing as a going concern, the enterprise, and with it the employment of its workers, may fail." 523 F.2d 170-171.

In most reorganization cases, applications for rejection of collective bargaining agreements will not be filed because contracts are either not burdensome or, in cases where the contracts are burdensome, the debtor and the employees' representatives negotiate modifications of such contracts in the ordinary course of the collective bargaining process. In its testimony during the hearings, a representative of the AFL-CIO stated that in 19 of 22 cases where the REA Express rejection standard was applied, the court approved rejection. In other words, in these cases the facts demonstrated that rejection of the collective bargaining agreements was necessary if the debtor was to survive. Thus, the controversy concerning the appropriate standard for rejection of a collective bargaining agreement is actually only relevant to cases where the evidence demonstrates that the collective bargaining agreement is burdensome, and where the equities favor rejection of the contract notwithstanding the fact that failure to permit rejection would not cause the collapse of the debtor as an ongoing economic entity.

Although the "balance of the equities" standard may not be necessary for relief in the majority of cases, the Bildisco standard is far preferable to the REA Express standard for several reasons. First, the REA Express standard cannot be accurately applied at the early stages of a reorganization case when the court and other parties in interest cannot fairly be expected to pass judgment on the depth of the debtor's financial problems and the debtor's probability of successfully reorganizing. Second, the standard is generally irrelevant in chapter 9 where the continuation of the municipality is presumed. Third, the standard is very difficult to apply under the new chapter 11 where the debtor (i) may be rehabilitated and continue as a viable economic unit or (ii) may be liquidated in whole or part. Fourth, the REA Express standard discourages good faith negotiations by unions in certain circumstances and may produce substantial inequities in cases where there are multiple operations or multiple bargaining units and where one collective bargaining unit refuses to modify a contract notwithstanding substantial concessions by other union or non-union employees.

The following is an analysis of some of these factual situations:

(a) Chapter 11 of the Bankruptcy Code is a more flexible reorganization structure than either Chapter X or XI of the prior Bankruptcy Act. One aspect of this flexibility is section 1123(a)(5), which permits a plan of reorganization to provide for the liquidation of the debtor's assets. Thus, an effective reorganization is possible under chapter 11 even though the debtor will not continue as an ongoing economic entity.[3] In a liquidating chapter 11 case, all executory contracts should be terminated except for those which will enhance the value of the debtor's assets in the liquidation.[4] Various formulations of the REA Express standard, which have been suggested for inclusion in the proposed Senate bankruptcy legislation, do not adequately deal with the need to preserve the flexibility which is so important in chapter 11. In those cases where the debtor has one operation covered by one collective bargaining agreement, the problem of applying the standard for rejection should be less troublesome than in the case of a debtor with multiple plants or divisions covered by different collective bargaining agreements involving different collective bargaining units. The "balancing of the equities" test better serves this latter category of cases.

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[3] See In re White Motor Corportion, No. B-80-3361 (N.D. Ohio).

(b) You should also be aware of the fact that the concern of the Second Circuit in the Kevin Steel case that rejection would deprive employees of rights which are incapable of forming the basis of a provable claim for money damages, is not applicable under chapter 11. The old Bankruptcy Act limited the allowance of unliquidated or contingent claims.[5] The Bankruptcy Code does not limit the allowance of contingent or unliquidated claims, but rather specifically provides for the estimation of such claims if fixing or liquidation would unduly delay the closing of the case.[6] Therefore, the Bankuptcy Code addresses the concern that the Second Circuit had about rejection of collective bargaining agreements. As the

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[4] For example, executory leases may be an asset of the debtor's estate and thus, may be confirmed under section 365(a) and assigned to a third party under section 365(f). If an asset is being liquidated, the debtor should be able to affirm those contracts which increase the value of the asset and reject those which diminish its value. If the continuation of a collective bargaining agreement relating to such an asset would diminish the value of the asset, the contract should be subject to rejection even though the debtor may continue as a going concern under a reorganization plan or may liquidate under a plan of liquidation.

[5] See, Bankruptcy Act § 57d [repealed].

[6] 11 U.S.C. § 502(c).

Supreme Court noted in *Bildisco*, the "balancing of the equities" test preserves the flexibility of chapter 11 in circumstances where the court should be relied upon to prevent abuse of the reorganization provisions of the Bankruptcy Code by debtors whose sole purpose in seeking relief is to avoid collective bargaining agreements.[7]

(c) A debtor may have several discrete plants or divisions or may have different collective bargaining units within a given plant or division. In those cases where employees in certain collective bargaining units are willing to grant concessions which enhance the debtor's ability to reorganize, the "balance of the equities" test permits a court to authorize rejection of a collective bargaining agreement involving a collective bargaining unit which refuses to grant concessions of the type agreed to by other collective bargaining units. Thus, the "balancing of the equities" test encourages negotiation and compromise which is the hallmark of chapter 11 and prevents the injustice of a small group of employees in one collective bargaining unit benefitting from the sacrifices of employees in other collective bargaining units. A current non-bankruptcy illustration of this situation is provided in the form of a recent Wall Street Journal article which is attached.

Very truly yours,

H. P. Minkel, Jr.

HPM:ka
enc.

cc: Ms. Sally Rogers
Charles A. Horsky, Esq.
Professor Lawrence P. King

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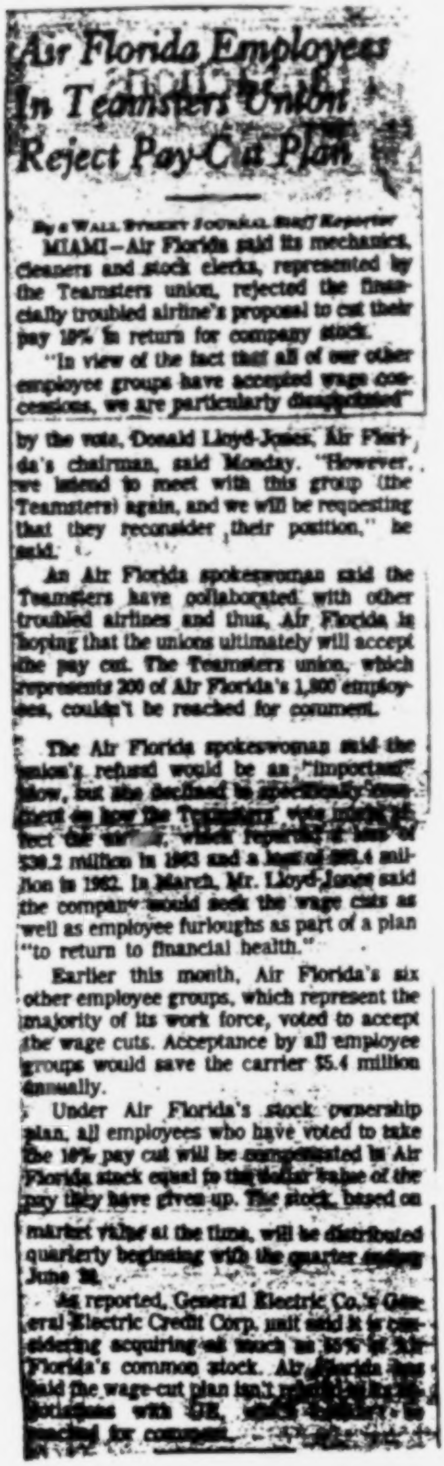
[7] The filing of a chapter 11 petition for the sole purpose of rejection an collective bargaining agreement is a "bad faith" filing and the case may be dismissed pursuant to 11 U.S.C. § 1112. *See In re Tinti Construction Co.*, 10 B.C.D. 767 (E.D. Wis. 1983).

THE WALL STREET JOURNAL
Wednesday, April 25, 1984



Air Florida Employees In Teamsters Union Reject Pay-Cut Plan

By a WALL STREET JOURNAL Staff Reporter

MIAMI—Air Florida said its mechanics, cleaners and stock clerks, represented by the Teamsters union, rejected the financially troubled airline's proposal to cut their pay 10% in return for company stock.

"In view of the fact that all of our other employee groups have accepted wage concessions, we are particularly disappointed" by the vote, Donald Lloyd-Jones, Air Florida's chairman, said Monday. "However, we intend to meet with this group (the Teamsters) again, and we will be requesting that they reconsider their position," he said.

An Air Florida spokeswoman said the Teamsters have collaborated with other troubled airlines and thus, Air Florida is hoping that the unions ultimately will accept the pay cut. The Teamsters union, which represents 200 of Air Florida's 1,800 employees, couldn't be reached for comment.

The Air Florida spokeswoman said the union's refusal would be an "important" blow, but she declined to specifically comment on how the Teamsters' vote might affect the carrier, which reported a loss of $30.2 million in 1983 and a loss of $[illegible].4 million in 1982. In March, Mr. Lloyd-Jones said the company would seek the wage cuts as well as employee furloughs as part of a plan "to return to financial health."

Earlier this month, Air Florida's six other employee groups, which represent the majority of its work force, voted to accept the wage cuts. Acceptance by all employee groups would save the carrier $5.4 million annually.

Under Air Florida's stock ownership plan, all employees who have voted to take the 10% pay cut will be compensated in Air Florida stock equal to the dollar value of the pay they have given up. The stock, based on market value at the time, will be distributed quarterly beginning with the quarter ending June 30.

As reported, General Electric Co.'s General Electric Credit Corp. unit said it is considering acquiring as much as 15% of Air Florida's common stock. Air Florida has said the wage-cut plan isn't [illegible] negotiations with GE, [illegible] be reached for comment.

The CHAIRMAN. I apologize to Mr. Lorenzo. I do not know what else to do, other than to attend this meeting. I would imagine I will be back no later than 4:30 p.m. I will try to be back at a quarter after 4, but you may have to wait until I get here. If I can get back earlier, I will also. But I am going to at least need a half hour, I know. With that, I will recess until 4:10 p.m. or 4:15 p.m. and try to get back a little earlier if I can.

[Recess taken.]

The CHAIRMAN. I apologize for the interruption, but frankly it was a top secret briefing in our secure room. I left early anyway. I just had to go, but I think I learned enough that I could leave early. I apologize for this being such a long hard day, but I knew it would be, and there was no other way I could resolve it, and I still have not asked all the questions I would like to ask of various witnesses. So we will have to do that in writing.

Mr. Lorenzo, let us turn the panel over to you. We will be glad to take your statement at this time.

STATEMENT OF FRANK LORENZO, CHIEF EXECUTIVE OFFICER, TEXAS AIR CORP. AND CONTINENTAL AIRLINES, INC., HOUSTON, TX; ACCOMPANIED BY CLARK ONSTAD, VICE PRESIDENT FOR GOVERNMENT AFFAIRS, TEXAS AIR CORP. AND CONTINENTAL AIRLINES, INC.; AND HARVEY R. MILLER, ATTORNEY AT LAW, WEIL, GOTSHAL & MANGES, NEW YORK CITY

Mr. LORENZO. Mr. Chairman, we appreciate this opportunity to testify before you today. My name is Frank Lorenzo, and I am president and chief executive officer of Continental Airlines, as well as Texas Air Corp., the majority shareholder of Continental. I am accompanied by Mr. Harvey Miller, on my left, a partner with the New York law firm of Weil, Gotshal & Manges, and on my right by Clark Onstad, our vice president of government affairs.

Our primary request to Congress is that there be no retroactive legislation adopted by the Senate. Retroactive legislation would force Continental into liquidation and eliminate 8,000 union and nonunion jobs.

The CHAIRMAN. Let me stop you there. You are talking about the date-of-enactment language? You would consider that retroactive?

Mr. LORENZO. That is correct.

The CHAIRMAN. Just so that we frame the issue, as I understand it, Continental still has not had an adjudication of its unilateral abrogration of the collective bargaining agreement?

Mr. LORENZO. Senator, there was some confusion this morning in the Teamsters' presentation. What was not pointed out was that we have been in bankruptcy for over 6 months and in fact have been in hearings for a good part of that time. For about the last 50 days, we have held hearings on the rejection of the labor contracts. We have already, as you know, had a decision in the case of the bad-faith filing, and you are familiar with the judge's decision on the case. The hearings in that case are part of the record in the labor rejection case.

So, while it is accurate to say that the judge has not rendered a decision, in fact the hearings have gone on for a long time and are expected to be completed in, I believe, 10 days. That has been the latest expectation.

The CHAIRMAN. Would it be fair for me to assume from your prior statement that we have a date-of-enactment provision in this final legislation, and the court opens this matter up and requires you to go and make what under the compromise would have been a minimal reorganization offer to the union, and the union rejected that. Are you saying you do not believe the court would sustain you with regard to your unilateral abrogation of the collective bargaining agreement?

Mr. LORENZO. Senator, I would be more than happy to answer that question. In my statement, I do go into the proposal. It was far more than a minimal offer made. It was made at a time when it really had to be made, and that was before we filed. I would be very happy to answer that now, or we could just go forward.

The CHAIRMAN. Go ahead. I will reserve questions until the end.

Mr. LORENZO. As I just indicated, retroactive legislation would force Continental into liquidation. Today, we are submitting for the record extensive written testimony on all relevant issues, including proposals for constructive change, and we will keep our oral comments brief.

On September 24, even before *Bildisco* was argued before the Supreme Court, Mr. Chairman, Continental Airlines filed for reorganization under chapter 11 of the Bankruptcy Code and ceased domestic operations. At that time, Continental had lost over $500 million since 1979. We had lost over $100 million just since the beginning of the year, and over $50 million in the prior 3 months. The company had a substantial negative shareholders' net worth and was in default on all of its secured loans. Continental ended the year 1983 with a loss of over $200 million.

On September 26, 1983, Continental filed an emergency motion asking the bankruptcy court to reject its union contracts, and it also altered wages and work rules for all employees. By this action, Continental did not reject its unions. They continue to be the authorized bargaining agents for 50 percent of our work force. Rather, Continental set aside contracts that it clearly could no longer afford to pay. Nonunion workers and management also suffered layoffs, pay cuts, and longer working hours. I personally took a pay cut from $250,000 to $43,000 per year from all sources of income.

On September 27, Continental renewed its domestic operations, serving 25 cities rather than 78; employing 3,700 individuals rather than 12,000; and offering low cost, quality service, with fares far below the other major carriers charge. Today, 6 months later, we have served the 3 millionth customer since entering reorganization, and we have saved those customers over $300 million under our new low fares, as compared to Continental's old fares, and we have increased Continental's employment to 8,000 people. And we are operating 85 percent of our previous airline, but now with a positive cash-flow.

The bankruptcy court ruled on January 17, 1984, after an extensive process that produced 500,000 pages of documents and 11 days of hearings, that Continental acted in good faith and was correct in filing for reorganization. The court has yet, however, either to complete the hearings or make a ruling on Continental's emergency motion to reject our union contract.

Mr. Chairman, much has been made of Continental's motives in filing for reorganization on September 24. However, the motive was simple: It was survival. Our credit was exhausted, and as the court found, we had 2 to 3 days of cash left. Continental was faced with two choices: Reorganize or go out of business after 50 years. Continental chose to reorganize.

Certain unions have launched a major campaign to convince the Senate to apply labor provisions in H.R. 5174 or some variant thereof retroactively to cover Continental and other reorganizations that are pending. Nothing that this Senate could do would be more unfair. In Continental's case, we filed for reorganization only after 2 years of good-faith bargaining with our unions' representatives. Our final offer to our unions' representatives was for a one-third stock ownership in the company, plus 25 percent of the pretax profits, in return for a $150 million wage and work rule concession plan that was divided among all of the groups of the company, union and nonunion.

The CHAIRMAN. You are saying that if the unions had taken that, the company would not have had to go into bankruptcy, and they thus would have become one-third owners of the company with a 25 percent profitsharing right?

Mr. LORENZO. That is correct. That was our expectation.

The CHAIRMAN. And they rejected that?

Mr. LORENZO. That is correct.

The CHAIRMAN. Now, when you say "they," you mean the machinists' union and the Air Line Pilots Association?

Mr. LORENZO. No. The machinists' union was not one already on strike. It was the air line pilots' union and the flight attendants' union.

This offer, as I indicated, was rejected without union members ever being given the opportunity to vote on the company's proposal. We had literally hundreds and hundreds of telegrams coming into the office from union members, saying "Please accept the plan," and they were never given a chance to vote on that proposal, Senator.

The CHAIRMAN. You mean, the union never held a vote on that particular proposal?

Mr. LORENZO. That is right.

The CHAIRMAN. The international union just rejected it out of hand?

Mr. LORENZO. That is correct.

This offer was made only after numerous and painful cost reductions that had been implemented throughout the rest of the company. During these 2 years of good-faith negotiations, Continental raised over $100 million in cash through debt and equity offerings, mainly through public offerings, plus $100 million from the sale of valuable assets to fund the company while negotiations with the unions continued during this period of time.

If the unions are successful in gaining retroactive application of the House labor contract provision, Senator, Continental will be liquidated. Every company now in chapter 11 reorganization whose plan of reorganization has not been formally confirmed by the court, or whose reorganization is in the appellate process, will, at best, have all previous proceedings and decisions called into question, and at worst, reopen to the detriment of the attempted reorganization.

These companies will be forced to start new legal proceedings, under totally new legal procedures and new substantive standards.

Mr. Chairman, on behalf of Continental's 8,000 employees, 85 percent of whom were on Continental's employment rolls the day we filed for reorganization, and on behalf of our customers, the cities we serve nationwide, our creditors and our shareholders, we implore that any new collective bargaining agreement provisions, either standards or procedures, apply only to chapter 11 reorganizations filed after the date of enactment of H.R. 5174.

Do not fall prey to the argument that either the standard or the procedures can be changed retroactively without causing harm. This is simply not the case.

Earlier in my statement, I stated that it would be extremely unfair to make changes to the collective bargaining provisions of the Bankruptcy Code that are retroactive. Let me place that statement in historical context, Mr. Chairman, with particular reference to Continental Airlines.

In April 1976, I testified before this Congress as the then-president of Texas International Airlines. I testified against airline deregulation, and I argued that we would be very severely hurt by deregulation. It was clear that we had much higher labor costs and more senior employees who would be disadvantaged by deregulation. But Congress had different views. It wanted airlines run by the free market, with low fares and new services that it would produce, and it decreed that businessmen like myself should make the necessary adjustment, even though it might be difficult, perhaps very difficult.

Little did I realize how difficult that transition would be. Little did I realize how fast the powerful marketplace would go to work on not only Texas International but also Braniff, National, Continental, Western, and so forth. Little did I realize how intransigent airline labor unions would be to the new economic realities.

My point is not to denounce deregulation, for I have since become a supporter. But rather, let me emphasize that now that the Congress has launched deregulation, and Continental has struggled and failed in this new environment, it would be particularly egregious to apply changes to the bankruptcy law retroactively to Continental. Mr. Chairman, unless Congress changes the rules on Continental, we are confident that Continental will survive reorganization to provide quality low-cost nationwide air services and thousands of jobs to our employees. Thank you.

[The prepared statement of Mr. Lorenzo follows:]

TESTIMONY
OF
FRANK LORENZO
CHIEF EXECUTIVE OFFICER
OF
TEXAS AIR CORPORATION
AND
CONTINENTAL AIRLINES, INC.

BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
AND THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

April 10, 1984

TESTIMONY OF FRANK LORENZO BEFORE THE SENATE JUDICIARY AND LABOR AND HUMAN RESOURCES COMMITTEES

I. INTRODUCTION:

Mr. Chairman and members of the Judiciary and Labor Committees, my name is Frank Lorenzo. I am the Chief Executive Officer of Continental Airlines, Inc., and Texas Air Corporation (TAC), the majority shareholder of Continental Airlines. Texas Air Corporation assumed control of Continental Airlines in March, 1982.

After losing nearly $500 million since 1979, Continental Airlines filed for Chapter 11 reorganization on September 24, 1983. At the time, Continental had two to three days of usable operating cash.

After a two day cessation of domestic service, but no interruption in international service, Continental Airlines resumed operations with 3,700 employees at 25 percent of its former capacity. In the six succeeding months, Continental has been able to expand its service to the point where we are operating at 85 percent of our previous capacity and provide jobs for 8,000 union and non-union employees, eighty-five percent of whom were on Continental's employment rolls on September 24, 1983.

Mr. Chairman, I am confident that Continental Airlines has an excellent chance of surviving reorganization and returning to financial viability as an efficient supplier of low cost, quality air service. Today, I would like to testify concerning the factors that forced Continental into reorganization, the options facing Continental on September 24, 1983, the status of our bankruptcy reorganization and the outlook for our company.

In addition, Mr. Chairman, I will address several aspects of the collective bargaining agreement provisions that are included in H.R. 5174, the Bankruptcy Amendments of 1984, as passed by the House. As you know, the House adopted amendments provide that the new collective bargaining provisions will apply only to Chapter 11 reorganizations filed after the date of enactment of the bill. However, certain unions, including the Air Line Pilots Association, the International Brotherhood of Teamsters and the International Association of Machinists and Aerospace Workers, are encouraging the Senate to make these provisions retroactive to cover Continental and hundreds of other pending Chapter 11 reorganizations.

Mr. Chairman, the retroactive application of the House amendment would result in the liquidation of Continental and the loss of 8,000 jobs. Retroactivity would be grossly unfair to Continental, its hundreds of creditors and the traveling public, which has already saved over $300 million flying with our recognized company. We can only request in the strongest terms that the Senate allow the House effective date to stand.

II. THE SITUATION FACING CONTINENTAL AIRLINES ON SEPTEMBER 24, 1983:

Continental's financial difficulties did not develop overnight, although the strike by the International Association of Machinists in August, 1983, undoubtedly accelerated the date when Continental's only viable option was a Chapter 11 reorganization. Rather, Continental's financial difficulties were the result of the accumulated effects of airline deregulation, fuel cost increases, a prolonged economic recession, high labor costs and decisions that were made in a regulated environment, but extended into a deregulated environment where these decisions simply would not work.

It must not be forgotten that every air carrier did not begin as an equal when the Airline Deregulation Act was passed. Some carriers had international route structures which were protected from the effects of domestic deregulation. Other carriers such as American and United had huge cash reserves. Some carriers had protected hubs such as Delta's and Eastern's hubs at Atlanta. Some carriers had choice airport facilities that have more than proven their worth as such facilities have become increasingly scarce. Continental's resources were in fact quite limited. Continental's international routes to the Pacific were losing money, the airline, having grown up and down the West Coast and across the southern tier during regulation, did not have a strong hub and Continental was not in a strong cash position. In brief, airline deregulation found Continental looking for a niche.

Airline deregulation also unleashed other forces, which when combined with the recent recession presented a very difficult course for Continental.

The Airline Deregulation Act of 1978 gave airlines the freedom to fly wherever they wished throughout the United States, subject only to the need to acquire necessary airport facilities. By ending Federal rate regulation, fare competition became a primary means of attracting passengers. Deregulation encouraged the emergence of a number of "new entrant" air carriers -- carriers committed to lower fares and able to offer those fares primarily because they maintained substantially lower labor costs than the established carriers. Continental in particular found new entrant competition because of Southwest Airlines which had been able to operate as a virtually deregulated carrier within Texas prior to airline deregulation.1/

1/ Airline employees were particular beneficiaries of the stability in the airline industry occasioned by the pervasive system of federal regulation that existed prior to passage of the Airline Deregulation Act. Due to the regulatory limitations on entry into new routes and the absence of true fare competition, airlines were generally able to pass through most costs to their passengers, including ever increasing labor costs. Coupled with the reality that the most significant economic peril facing the industry during this period was labor unrest or strikes, the regulatory system did not offer airline management much incentive to resist vigorously union demands for higher wages, fewer hours and more benefits.

The result was the emergence of an airline labor force at the established carriers, such as Continental, that received very high salaries, in comparison to employees in other industries. As deregulation has completely changed the

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Both in response to the competitive pressures exerted by new entrants and as a reaction to the new freedom growing from the elimination of rate regulation, the airline industry in the last few years has experienced wholesale price discounting. In addition, the prolonged economic recession reduced the amount of money corporations and individuals could spend on air travel. These factors resulted in the cost of a ticket becoming the major factor considered by many air travelers in deciding both whether to fly and on which airline to fly.

But as the revenues being received by the airlines dropped along with ticket prices, the established airlines did not experience a parallel drop in expenses. Fuel costs remained high and most established carriers remained saddled with enormous debt for equipment purchases, interest on which was often increased during the economic recession. Moreover, much of this debt was for equipment that was unneeded during this period of reduced air travel. Finally, the labor costs at the established carriers were far too high. For instance, at Continental, on September 24, 1983, our pilots were averaging $89,000 per year in wages and fringe benefits for a 53 hour work month. After a year of negotiations, Continental had

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economics of the airline industry, enormous pressure has been placed on the established union wage scales and work rules of the industry.

succeeded in increasing the work month for pilots from 45 to 53 hours. Federal Aviation Administration (FAA) flight time/duty time rules permit pilots to work a 100 hour work month.

The product of all these factors has been record breaking operating losses for the industry as a whole since deregulation. The annual losses sustained on an industry-wide basis ranged from $199 million in 1979 to $733 million in 1982, and over half a billion dollars in the first six months of 1983 alone.

Virtually all of the major carriers established prior to this new era have felt the shocks of deregulation. Across-the-board, these carriers have responded with efforts to reduce costs and increase productivity and efficiency in today's competitive environment. The ability of a company to rationalize its wage scale, however, often has been a factor of its cash reserves and its cash flow. Specific actions taken by carriers range from employee concessions and contract renegotiation, to offers of stock in lieu of a portion of wages, to employee purchases of aircraft for operation by their companies, and, in at least one case, to agreement with the unions under which present airline employees are grandfathered at their pre-deregulation wage scale, but new-hires are paid substantially less.

In sum, not all airlines were dealt the same hand when airline deregulation was passed. Some companies had more cash, protected international routes and developed hubs. Others were ill-prepared by the haphazard manner in which route structures developed under regulation and had far less cash. Combine this with the fact that airline deregulation has come to various parts of the country in varying degrees and it is readily apparent that some companies were bound to find themselves in more difficulty than others.

A. Continental Responded To Market Pressures By Seeking To Reduce Its Labor Costs And Restructuring Its Route System:

For Continental, the impact of the economic realities of the 1980's and the post-deregulation era has been particularly harsh. Losses (calculated before taxes and excluding gains from sales of assets and other non-recurring items) for Continental from January 1, 1979, through June 30, 1983, totalled $471.9 million.

As early as 1981, Continental's current management recognized that, if these huge losses were to be reversed, the company's cost structure must change. Therefore, in 1981, discussions were initiated with all of the airline's unions -- the Air Line Pilots Association (ALPA), the Union of Flight Attendants (UFA) and the International Association of Machinists (IAM) -- in an effort to conclude agreements on appropriate cost reductions. Such "employee concessions" have become a relatively standard feature of the airline industry today. It was management's judgment that our first effort should be to work with our employees to create a more competitive airline.

In addition, the company recognized that market forces dictated a restructuring, as opposed to an expansion, of the company's route system and operations. Continental adopted the "hub and spoke" concept, which has proven very successful for a number of air carriers over the years. Under this system, the operations of the airline are centered at one or two airports, known as the airline's hubs. In a well developed system, the overwhelming majority of the airline's operations will pass through the hub airport as flights to and from various "spoke" airports feed into the hub. The hub and spoke concept allows for the centralization of management and maintenance and other activities, with resulting efficiencies and cost savings.

It was not until September, 1982, that Continental's efforts to achieve cost reduction agreements with the company's unions met with any success. At that time, the company concluded a significant agreement with ALPA. At the time, this agreement was one of the most significant to have been achieved in the industry. But by today's standards, it is relatively modest. It was apparent even then, however, that further savings would be needed if we were to turn the company around. ALPA was put on notice at that time that further concessions would be needed for the company to be viable, and in fact, discussions on this topic began in October, 1982, with renewed negotiations following in January, 1983.

Continental's efforts met with relatively less success from its other unions. Talks with the IAM and UFA instituted in 1981 produced no agreement. The renewed negotiations with ALPA continued into summer, 1983, with no conclusion. In August, 1983, the IAM struck Continental, after management refused to meet the union's demands for a 36 percent increase in pay with virtually no increase in productivity. Management offered a 20 percent increase in pay ($6,000) for a 20 percent increase in productivity. Fifty-six percent of the IAM workers crossed the picket lines on the first day of the strike and received the 20 percent increase in pay.2/

Continental's route restructuring was, we believe, much more successful. The route restructuring allowed Continental to regroup around two defensible hubs -- Denver and Houston. It also increased the ratio of connections available, which in turn increased the carrier's ability to generate passengers. As of September 1, 1983, 99 percent of the airline's domestic flights fed into our Houston or Denver hubs. Yet the company's severe losses continued and indeed worsened. Profitability had not returned to the company for several reasons: we faced more

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2/ Subsequent to the strike, several Continental employees who are IAM members provided the company with evidence that employees of the national IAM had stuffed the ballot boxes to achieve the required percentage for a strike vote, and had deliberately prevented the local IAM leadership from receiving the full details of Continental's offers. Based upon these facts, Continental has instituted a $250 million lawsuit against the IAM.

low cost competition on our routes than any other major air carrier; we faced competitive disadvantages in the computerized reservation systems relied upon by many travel agents; and we continued to pay significantly higher labor costs than many of our competitors.3/

1. The pressures arising from Continental's labor costs were severe:

Two aspects of the labor cost issue are particularly pertinent. The first concerns the level of employee compensation. The three principal organized groups of employees at Continental in September, 1983, were very highly compensated. At that time, the average Continental pilot earned $89,400 per year (including benefits) for approximately 53 "hard hours" of flying per month, which translated to about 11 days on duty per month. For the pilot of a widebody aircraft, such as the DC-10, the compensation package was even more attractive: an average of $138,600 for the same amount of work. With their generous vacation privileges and restrictive work rules, our pilots were in a very advantageous position.

3/ The Civil Aeronautics Board has recently instituted a rulemaking to consider ways of reducing the bias of the computer reservations systems on which most travel agents rely for airline bookings. These systems -- which are dominated by two major carriers, United and American -- pose a number of competitive disadvantages to carriers like Continental. Display bias and preference for the owner-carrier are only two of these disadvantages.

Under the contracts existing in September, 1983, the average Continental flight attendant earned $37,300 per year (including benefits) for approximately 53 hard hours of flying per month. The company's mechanics (except for those newly-hired to replace striking IAM members) were paid $16.00 per hour, and made an average annual salary of $39,300 (including benefits).

The second aspect of the labor cost issue -- and one equally as burdensome to the company as the high compensation levels -- were the restrictive work rules in our labor contracts. By and large these rules are a vestige of the pre-deregulation era. The failure to update these work rules as the economic conditions of the industry changed had a substantial impact on Continental.

As a result of the flight time/duty time limitations of its existing labor contracts, Continental was forced to employ hundreds of pilots and flight attendants that it did not need.4/ The work rules further hampered the Company's ability to manage its work force and in many cases either cost the company substantial amounts of money or forced it to offer a less attractive product to the public.5/

4/ It is useful to compare, for example, the present work rules that apply to pilots at three airlines in competition with Continental: Muse Air, People Express and Southwest. Based on operations in the first quarter of 1983, pilots at Muse Air flew, on an average, 85 hard hours per month. At People Express, that figure was 75 hard hours, and at Southwest, 74 hours.

5/ For example, pilots under the existing contract, in some circumstances, were not allowed to make more than a maximum of

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2. High labor costs and restrictive work rules placed Continental at a significant competitive disadvantage:

Taken together, the compensation levels and work rules of Continental's existing labor contracts produced the following situation: labor costs at Continental Airlines in 1982 accounted for 35 percent of its total operating costs. By contrast, two of Continental's low fare competitors, Southwest and Muse Air, had labor costs that comprised 26 percent and 12 percent of their total operating costs, respectively. Our calculations show that had we been able to reduce our labor costs to the average of Southwest and Muse's costs, or 19 percent of total operating costs, Continental would have made $71.3 million in 1982 rather than losing $135.5 million, as we did. There can be no more graphic illustration of the impact of high labor costs on the airline, and indeed on its ability to stay in business.

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four to six landings in any duty period, and were required to have a minimum of 10 hours and 45 minutes of rest between duty periods. These restrictions -- which are substantially in excess of applicable FAA regulatory requirements -- effectively inhibited management's ability to use the work force and the company's equipment productively. The result could well be passenger inconvenience, if a flight scheduled to arrive in the evening was more than one-half hour late, and the trip to be flown by that pilot the next morning was therefore delayed. In a hub and spoke route system, such delay would ripple through the entire system causing further delays and reducing the company's on-time performance, thereby further weakening its competitive position.

B. Continental's Best Efforts To Respond To The Demands Of The Marketplace Having Failed, The Financial Situation Facing The Company Became Acute:

Throughout 1983, Continental's financial condition deteriorated rapidly. In addition to the $472 million loss suffered between 1979 and June, 1983, the company lost $8.0 million in July, 1983, and another $17 million loss was recorded in August. At the time of the filing for reorganization under Chapter 11 on September 24, 1983, projections were that the company would lose at least $24 million in the month of September. Thus, the nine month loss total for 1983 alone would have reached $133 million.

In addition to the losses, the Company experienced a serious diminution in stockholder equity. Stockholder equity in 1979 totalled $288.6 million. By the end of August, 1983, that equity had dropped to less than $1 million. Because preferred shareholders had a claim against the company for $44.7 million, the equity of common stockholders was minus $43.8 million.

These losses and the lack of stockholder equity severely hampered Continental's efforts to raise additional funds. Between the first quarter of 1982 and June 30, 1983, Continental had raised $109 million in cash from the sale of assets, $114 million from debt and equity financing and $24 million from other sources, for a total of $276 million. The company's ability to raise this level of funds, given the state of the capital market for airlines and the depressed status of the used aircraft market (one of the company's primary assets), was remarkable in itself. In addition, Texas Air Corporation had infused Continental (and Texas International Airlines, which was officially combined with Continental in 1982) with over $80 million between June, 1981 and June, 1983.

As would be expected, Continental was running seriously low on cash in September, 1983. In June, 1983, Continental had $89 million in cash, of which $58.7 million was available after allowing for a float of restricted cash. By the end of August, that $89 million had shrunk to $62.2 million, and only $27.7 million of that amount remained available after float of restricted cash. In addition, Continental was in default under the terms of all its major loan agreements.

C. A Strike By The International Association of Machinists Added Another Burden:

Continental had been in contract negotiations with the IAM since October, 1981. Substantial wage increases were offered to many of the IAM-represented personnel in the course of those negotiations -- increases tied, however, to offsetting productivity increases. Considering our financial condition at the time, we felt that our offers were extremely generous.

For its part, the IAM demanded wage increases that would have cost the company $26.3 million over the remaining 17-month term of the proposed new contract, without any meaningful productivity increases. In early August, the company was informed that the union members had rejected our contract proposal.

Continental then had to decide whether to submit to the IAM demands or face a potentially crippling strike. Our decision was to refuse to accede to the union's demands. We understood that we were taking a substantial risk. However, we felt that we had no choice if we were to have any chance in preserving the viability of the company. Our unions and our non-union employees were following closely our negotiations with the IAM. The company subsequently withdrew the contract offer rejected by the union and, on August 13, 1983, IAM-represented personnel struck Continental Airlines.

Continental had prepared for the strikes by hiring contract machinists to maintain our aircraft during the strike. We were gratified that over fifty-six percent of the IAM-represented mechanics crossed the union's picket lines and reported to work. As a result, Continental was able to keep flying during the strike. But there is no question that the strike took its toll on the airline.

The company undoubtedly lost a large number of bookings due to uncertainty among consumers that the company would be able to continue its operations. During the first six days of the strike, 15 percent of the airline's operations were cancelled, and for the next 13 days, there was a 7 percent cutback in service. Because overhead could not be reduced correspondingly, the revenue losses associated with the strike had a direct impact on the company's net results. Because of the strike, we were required to increase security, increase subcontracting of work that our own mechanics would normally have performed and arranged for standby flight attendants when it appeared the UFA would honor the IAM picket lines. Substantial costs were associated with each of these actions. And the union's strike tactics -- undocumented and unsupportable allegations regarding the safety of Continental's services -- may also have damaged the company's competitive position.

How much of the resulting decrease in the company's load factor is directly attributable to the IAM strike is, of course, impossible to calculate. But the facts are that in the first 30 days of the strike, our load factor was only 54.7 percent, 3 percent lower than the corresponding period a year earlier even though the nations economy had improved substantially and air travel was increasing. Average fares (yields) were higher than for the corresponding period in 1982, but this increase was not sufficient to offset the lower load factors and the lost revenue from curtailed operations.

D. Continental's Good Faith Efforts In September, 1983, To Achieve Concessions From Its Labor Unions To Enable The Company To Stay In Business Were Unsuccessful:

The combination of the company's deteriorating financial picture, along with new entry into its route systems by low fare carriers and the IAM strike made it even more imperative that Continental promptly reduce its labor costs. Because the capital markets were closed to the company, and asset sales were no longer a realistic solution because there were no more significant unencumbered assets, there was no other alternative available to the company than to obtain cost concessions from its workforce.

On August 31, 1983, we presented a cost reduction proposal to the employees. The company sought total labor cost savings (compared to May, 1983, levels) of $150 million annually. Of this amount, $20 million would have been obtained from the mechanics -- in fact most of these savings had already begun to be obtained as a result of the wage and work rule changes implemented since the IAM strike. An additional $30 million was to come from non-organized employees, comprised of management itself and the agent and clerical employees.6/

6/ It should be noted that the concessions to be sought from management, agency and clerical personnel were merely the latest in a series of sacrifices borne by these groups. Early in 1983, the company had been forced to furlough approximately 25 percent of its management personnel and 12 percent of its agent and clerical personnel. These furloughs imposed rather severe work strains on the remaining personnel. The pay freeze on management and the increased work load cost the company experienced management personnel that we could ill afford to lose.

From the pilots and the flight attendants, Continental asked for annual compensation and productivity concessions worth $100 million. Of this total, $60 million was to come from the pilots and $40 million from the flight attendants.7/

While the company was asking the pilots and flight attendants to give a substantial amount back, we made it clear that we were willing to make a major commitment to our employees through the institution of a profit sharing plan that would have been the most generous in the industry. The proposed profit sharing plan would have paid over to all employees (other than company officers) a full 25 percent of the company's profits (before taxes and special items) beginning with the very first dollars the company earned.8/

7/ Despite the magnitude of these concessions, the pilot and flight attendant jobs would have remained very attractive. The average Continental pilot would have earned total annual compensation (including benefits, but not including the profit-sharing that was also offered to the pilots) of approximately $60,000. For flight attendants, the total annual compensation figure would have been $25,900. These figures would have placed the pilots in the top 4 percent of all wage earners in the country, and the flight attendants in the top 30 percent. More significantly, the pilots and flight attendants would still have been compensated at a level significantly higher than the compensation available at many highly-competitive new entrant airlines, such as Muse Air and People Express.

8/ By and large, traditional profit sharing plans share profits only after earnings have reached a predetermined level considered necessary to assure that the capital invested in the enterprise has an opportunity to earn an adequate return. Because we believed that the concessions we were asking would have enabled the company to return to profitability, the proposed profit sharing plan would have produced significant benefits for our employees.

In addition to the profit sharing plan, management proposed an extraordinary stock ownership plan that would have made the employees the owners of 35 percent of Continental Airlines (on a fully diluted basis).[9] Under the plan, employees (other than officers) would have received 12 million shares of Continental common stock. One-third of these shares were to have been granted as a bonus (i.e., without the necessity of the employees paying anything for the shares). These shares would have been donated by Texas Air Corporation. The remaining 8 million shares would have been issued pursuant to a stock option plan that would have provided for the grant of options with an exercise price of 85 percent of the value of Continental common stock at the time of the plan's implementation. Employees would have had until March, 1985, (18 months) to choose whether to exercise their stock options. Employees choosing to exercise their options would have had two years to pay for the stock pursuant to a payroll deduction plan that the company was willing to implement.

Management also offered a plan to ensure employees a greater voice in the affairs of the company. This plan included the election of one representative of the employees as a director of Continental, as well as the establishment of a management council through which representatives of the employees and senior managment would meet periodically.

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[9] Had the stock ownership plan been accepted, Continental's employees would have assumed a degree of employee ownership unmatched by any other airline in the world. Assuming full implementation of the plan, the employee group would have become the largest single stockholder group, supplanting Texas Air Corporation. The employees would have had more than a 50 percent interest in the profits of Continental.

In retrospect, many have asked why we made such a generous offer which was unprecedented in the airline industry. The reason is straightforward -- we did not want to go into bankruptcy and truly believed that this offer would be accepted by our employees.

Upon announcement of the cost reduction program, the company instituted concerted efforts to convince its pilots and flight attendants to participate in the effort. I personally made detailed presentations to the leadership of both unions and participated in a series of employee meetings explaining the company's needs and responding to questions. The company also mounted a telephone campaign designed to reach as many pilots and flight attendants individually as possible. Numerous mailings to the employees were made. In response, we found widespread understanding of the economic realities facing the airline, both from the rank and file employees and from the unions themselves.

Management determined that the company's deteriorating financial position required decisive, definitive and immediate action. For this reason, the company established and repeatedly emphasized September 19 as the deadline for a response by the unions to its cost reduction proposal. But the leadership of the pilots' union initially refused even to meet with us. When a meeting finally took place, the union negotiators stated that they would not accept the company's proposal and had no counterproposal to offer.

The company met with the leadership of the flight attendants' union, who presented a proposal purporting to represent concessions in excess of those requested by the Company. But after analysis, the shortcomings of the UFA proposal, and its inability to produce the necessary savings, became clear. Although the company proposed alternatives to the provisions included in the UFA proposal, we were ultimately unable to reach agreement with the union.

When September 19 passed without agreement, the company continued negotiating with the unions. On September 22, 1983, the airline's Board of Directors met to consider the cash position of the company.[10] It was clear at that time that the payment of salaries, debt service, pension contributions and some back payments to vendors would exhaust Continental's cash by September 30. There was no way that the company could bring vendor payments close to current even though many were demanding payment and threatening to cut off services. Still, the Board of Directors instructed the company's management to make one last effort to achieve the necessary savings, after which management was to report back to the Board of Directors.

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[10] Since the announcement of the request for concessions, rumors of the impending bankruptcy of the airline had begun to spread. These rumors had an immediate negative impact on the airline, as they caused travel agents to begin "booking away" from Continental. This, of course, only exacerbated the company's financial position, inasmuch as travel agents supply over 60 percent of Continental's business.

On Friday, September 23, the company met with the pilot union leadership, in the hopes of at least receiving an ALPA counterproposal to the company's August 31 proposal. No counterproposal was made. The company attempted to arrange a negotiating session for the morning of Saturday, September 24th, but the union representative, responding that he saw no urgency, indicated that the earliest he would be available would be Monday, September 26.

The Chairman of the ALPA Negotiating Committee was contacted later on September 23 and advised that a Chapter 11 petition was a real and immediate possibility. Continental again requested a meeting for further negotiations on Saturday morning. The leadership of the UFA was also requested to meet on Saturday. At midnight on September 23, ALPA advised that it would not meet on Saturday. At the last moment, the leadership of the UFA also cancelled a planned Saturday morning meeting.

Time had run out. Continental was receiving 400 calls a day from creditors seeking to be paid, and cash was perilously low; in the previous week, Continental had lost nearly $10 million in cash. We became convinced by the actions of the unions that we would not be able to obtain the necessary concessions and cost reductions. Decisive action was necessary to preserve the assets of the company for its shareholders, creditors and employees, and for the traveling and shipping public. Continental filed for voluntary reorganization under Chapter 11 at the Bankruptcy Code in the early evening of Saturday, September 24, 1983 and ceased all domestic operations. I would emphasize that we kept the international services operating because to cease these services would have stranded thousands of people in places as distant as Caracas, Venezuela, Auckland, New Zealand, Majuro and Saipan. At the same time, Continental and the U.S. Government could have been faced with the possible loss of these valuable route rights due to the potential recalcitrance of foreign governments to allow the resumption of service at a future date.

III. CONTINENTAL'S OPTIONS: CHAPTER 11 REORGANIZATION OR LIQUIDATION:

A. The Goals Of Continental's Filing:

Continental's first objective as debtor in possession was to keep as much of the airline operating as possible, thereby saving as many jobs as possible, maximizing revenues for renewed operations and minimizing passenger inconvenience. Nonoperating airlines quickly lose the confidence of the flying public and face enormous difficulty resuming their operations. We were familiar with the example of Braniff International

Airways which, by September, 1983, had been grounded in bankruptcy for 16 months because of its inability to resume operations immediately after filing for reorganization. We knew that our best chance to succeed in reorganization would be to "fly through" it.

In the aftermath of the Chapter 11 filing, Continental's domestic route system was closed for two days. On September 27, Continental resumed domestic service, offering limited service to 25 cities (prior to reorganization, Continental had served 78 airports in the United States). When the company resumed its operations, its overhead had been reduced by 65 percent and the workforce had been stabilized at 3,700 (prior to reorganization, Continental had employed 12,000 individuals). We were operating 35 planes as opposed to the 108 planes we were operating when we went into reorganization.

The service offered by the New Continental is based on a low-fare philosophy. Our initial fares were $49 on any nonstop segment of the company's route system for the first 4 days of our renewed service and $75 thereafter until October 22. The public response was excellent. On September 29, Continental's reservation system received 1 million telephone calls, 60 percent of those from persons looking for seats on the carrier. Thus, only a few days after our darkest corporate moments, Continental was already signaling to our competitors and the public that we were a coming force with which to be reckoned.

B. The Bankruptcy Court Has Concluded That Continental Acted Properly In Filing Under Chapter 11:

On January 17, 1984, the bankruptcy court ruled against a motion filed by Continental's unions on October 11, 1983, seeking to dismiss Continental's petition for reorganization. After 11 days of hearings and the production of 500,000 pages of documents by the company, the court found that Continental had filed for reorganization in good faith; that Continental had only 2 or 3 days of cash left on September 24, 1983; and that Continental's management had taken the proper action in filing for reorganization.

The text of the court's January 17, 1984, decision is appended to this testimony as Attachment A. In finding for Continental, the court recited the lack of success Continental had achieved in its efforts to reach an agreement with its unions for concessions, and rejected the unions' arguments that, just because Continental had survived one cash crisis in 1982-1983, Continental could survive the cash crisis in September, 1983. The court concluded that by the date of the filing Continental had exhausted its credit and was unable to pay its debts as they matured. The court found that the company faced $42 million in unsecured trade debts and was in violation of the liquidity provisions of its loan agreements with secured lenders. Against this background, the court concluded (Memorandum Opinion at 5-6):

> [t]he evidence showed that there was no way for Continental Airlines to repay its obligations nor even to continue its operations for very long in the future, as things then existed. Had the airline not filed its Chapter 11 proceeding when it did, it would not have been flying for very much longer, its 6,000 remaining employees would now be out of a job or working elsewhere, and its ability to reorganize would have been further seriously impaired.
>
> This court finds that the Continental Airlines group filed their respective Chapter 11 proceedings for the purpose of attempting to keep the companies alive and functioning and that they had no other viable alternative to that end. The unions have not satisfactorily demonstrated that there was any reasonable alternative under which the airline would keep operating, and this court finds there was none.
>
> Further, had not Continental Airlines filed their Chapter 11 proceeding when they did, an involuntary proceeding might well have been filed against them, and, as they were not paying their debts as they matured, an order for relief would have been entered.

(Emphasis supplied, footnote omitted.)

On the question of Continental's motivation in rejecting its collective bargaining agreements, the court was equally explicit in its dismissal of the unions' claims (Memorandum Opinion at 7-8):

> [the unions] argue that the sole, or at least the primary purpose in filing was to reject these agreements and that Continental Airlines has not shown that it intends to reorganize through and by a Plan of Arrangement. This court has determined the facts to be contrary to this proposition. The debtors have shown themselves to have a need for this proceeding in areas other than with respect to collective bargaining agreements.

* * *

> Neither the sole nor primary purpose of the filing was to reject these executory contracts; although it is clear that at filing Continental Airlines expected to be able to do this under the provisions of [the Bankruptcy Code].

(Emphasis in original.)

IV. CURRENT STATUS REPORT ON CONTINENTAL:

In the six months since Continental filed for reorganization under Chapter 11, we have made rapid progress. While a final decision on the merits of our motion to reject our union contracts has yet to be issued by the Court, we are confident of the ultimate approval of our actions. We are also confident that a plan of reorganization can be obtained that will be fair to all our creditors, our employees and our shareholders. And, we are particularly gratified that Continental has already received the approval of its new service from the traveling public.

A. Continental's Business Today:

After the temporary suspension of domestic service on September 24th, Continental resumed flying on September 27 at 27.1 percent of its pre-reorganization capacity. Continental's service was available in 25 of the 78 cities previously encompassed in its route system. (See Attachment C.)

On October 30th and again on November 15th, Continental added domestic flights. By the month of October, 1983, Continental's system wide load factor was 65.3 percent. Continental's operating performance in that month was exceptional, especially in view of strikes by the pilots' and flight attendants' unions. On-time performance improved throughout the month, so that by the end of October, more than 90 percent of all Continental's domestic flights departed within 15 minitues of their scheduled departure time. In November, the airline operated approximately 50 percent of its pre-reorganization system capacity, with a total of 200 daily departures system wide.

The company's operations continued strong in November and December. November brought a 62.9 percent load factor. That factor increased to 66.8 percent in December despite the fact that the winter months are traditionally "soft" months in terms of airline demand. (See Attachment D.)

Effective January 15, 1984, Continental was flying at 56 percent of its pre-reorganization system capacity, with 255 daily departures system wide. Departures from the airline's two hubs stood at 61 daily departures from Denver and 64 daily departures from Houston.

In February, 1984 Continental implemented its largest system wide expansion since last fall, bringing us up to 64 percent of the pre-reorganization system capacity and 298 system wide departures per day, including 69 from Denver and 79 from Houston. Continental Airlines served 58 cities worldwide in February, 1984.

As of March 1, 1984, Continental had resumed flying 75 percent of its pre-reorganization system capacity. Increases in the level of operations that were made on April 1st have brought Continental back to 85 percent of its prior capacity as we move toward our commitment to fly at 90 percent of our pre-reorganization capacity by this summer. Continental's fleet today consists of 105 aircraft: 60 Boeing-727's, 34 DC-9's and 11 DC-10's. On an average, Continental aircraft fly 300,000 plane miles daily.

Thus, the company's recovery as a slimmed down, efficient competitor has been dramatic.

B. The Public Response To Continental's Service:

The public has responded overwhelmingly to Continental's new services and new low-fare philosophy. Continental has flown its three millionth passenger since filing for reorganization on September 24th.

Since resuming service with a $49 one-way fare system wide, Continental has been very successful in maintaining its commitment to low fares. Continental's fares are consistently lower than its competitors. While Continental's fares have been matched on a limited basis by some carriers in some markets, Continental clearly holds the distinction of being the largest carrier offering low fares on every seat on every flight, every day.

Continental's low fare philosophy has not, of course, diminished in any way our commitment to offering the premium quality service expected of a major established airline. We have also introduced service improvements, such as the recent introduction of our widebody "Pub" service, and intend to maintain our competitive position in the days ahead.

Consumer savings as the result of Continental's operations have exceeded $300 million. An illustration of the difference in Continental's fares in a single market will suggest the reasons we have been successful. When Continental inaugurated service on February 17 between Denver and Newark, New Jersey, Continental offered fares of $125 off-peak, $150 peak and $225 first class. Other airlines charged $362 one-way, nonstop, between Denver and Newark in coach, and $543 in first class.

Continental is truly bringing the full benefits of deregulation to the traveling public.

C. Employment By The Company:

From a low of 3,700 employees immediately following the filing of the Chapter 11 petition, Continental has increased its workforce to approximately 8,000 people today. We expect to have approximately 9,000 employees by June.

When Continental filed for reorganization, our guiding standard was to align our wage rates with market wage rates while at the same time making our employees shareholders, and establishing a profit sharing plan. In addition, we set about to increase employee involvement in operational decision making.

After filing for reorganization, Continental reduced pilot and flight attendant wages and fringe benefits by approximately 50 percent, but not to the new entrant airline level. For example, Continental put in place a set of work rules and wages more advantageous to the pilots than those ALPA had agreed to three months before with the new Braniff. Captains were paid $43,000 per year as compared to the $32,000 to $35,000 that new entrant carriers were paying captains. (See Attachment E.)

Each employee who worked the month of October is entitled to a pro-rata share of 1 million shares of stock donated by the Texas Air Corporation. In addition each employee is entitled to participate in employee stock ownership plans and profit sharing. Under the profit sharing plan, the employees are entitled to 15 percent of the first dollar of profit earned and this can increase up to 25 percent based upon an established formula. While the profit sharing plan has been approved by the bankruptcy court, the unions have to date successfully delayed court approval of the stock grant and the activation of the employee stock ownership plan.

Employee participation in decision making is also a major part of employment at Continental Airlines. Before the petition for reorganization was filed, Continental's 6,000 non-union agent personnel organized an agents council to deal with the company on matters affecting their employment. Continental has expanded this concept to all segments of the workforce. In the case of the segments of the workforce still represented by the unions, these operational councils deal only with operational problems and opportunities and not with wages or work rules. Issues that either cannot be resolved at this level or that merit being raised to a higher level are considered at a President's forum which I chair. To date this form of participatative management is working quite well but we still have a lot to learn.

Overall, the spirit of Continental's employees is exceedingly high and, as we build back, our employees are receiving raises and increases in their fringe benefits.

D. Labor Negotiations:

I have discussed our union negotiations in the months preceding our reorganization filing. After the Chapter 11 filing, we attempted to negotiate with our unions under the difficult circumstances that were created by the filing. We sent letters to all our unions discussing the bankruptcy filing and the position Continental would have to take on labor issues.

We indicated then that Continental would not assume prior labor agreements (exercising the option provided in section 365 of the Bankruptcy Code to the debtor in possession to accept or reject collective bargaining agreements), but that Continental continued to recognize its existing unions as the collective bargaining representatives of the employees. The company requested immediate negotiations on a set of proposed emergency work rules to be implemented for the international operations that Continental hoped to continue uninterrupted. Continental also requested immediate bargaining on a new agreement, pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. § 156.

A proposal for a new agreement with ALPA was sent to the union. The proposal was based essentially on a contract recently signed between ALPA and Braniff International Airways, which was also in reorganization. We also sent a contract to the UFA that was modeled on the contract the Association of Flight Attendants had signed with Braniff.

By and large the company's efforts to conclude negotiations with its unions in the immediate aftermath of the Chapter 11 filing met with very little success. On Thursday, September 29, 1984, Continental learned that ALPA had announced that it was calling a strike against the company at 2 a.m. C.D.T., Saturday, October 1. Despite Continental's repeated requests for emergency negotiations, at no time had any ALPA representative agreed to meet or negotiate with Continental Airlines prior to ALPA's strike call.

On Friday morning, September 30, ALPA finally agreed to meet with Continental. The meeting began at 1:30 p.m. and, after multiple recesses, adjourned at 9:30 p.m. For the first time in recent Continental labor history, the attorney for ALPA-International, rather than the representitives of the ALPA-Continental Negotiating Committee, was present and served as the chief spokesman for the local chapter of the union. Members of the Continental Pilots Negotiating Committee were present but were virtually silent as the ALPA-International attorney indicated that he spoke for both the Continental pilots and for the union.

At the September 30 meeting, ALPA representatives asked questions about the Emergency Work Rules but refused to make any counterproposals of their own, even when asked to do so by the company. The ALPA representative stated that the union would not accept the wages and work rules that the union had only recently agreed to accept from Braniff.

At 2:00 a.m. on October 1, 1983, ALPA, joined by the UFA, struck Continental Airlines. These new strikes, plus the continuing strike of the IAM, meant that Continental was now being struck by all three of its major unions.

On October 6, 1983, negotiations were resumed and continued without success through October 7th. Finally, on October 14, ALPA presented a counterproposal to the company's pending proposals. That counterproposal called for a temporary 7 percent pay cut (senior captains would see their salaries reduced to $100,000 per year). The ALPA proposal would have further provided pilots with a retirement income of between $60,000 and $100,000, and guaranteed senior captains a salary in excess of $115,000 per year by 1985, plus profit sharing and stock plans. Clearly, Continental had no choice but to reject this offer.

Continental continued to negotiate with its unions throughout the month of October. Importantly, Continental did not hire a single new pilot during this period despite the fact that the ALPA strike had reduced the pilot workforce to below 200 pilots. In the latter part of October, we advised the pilots that they had until November 1 to return to work before the company would begin to hire replacement pilots. This was a difficult decision for which we can be criticized by our creditors and other employees. By waiting over five weeks to hire a single new pilot, Continental risked loss of market share and incurred added expense for the grounded aircraft. Balanced against this was the realization that hiring new pilots would make it far more difficult to resolve the strike. New hires would be coming from other air carriers where they would otherwise have recall rights. Basic ethics, operational reality and a recent Supreme Court decision require that after asking an individual to come to work for the airline, once hired, Continental would not replace these individuals with strikers in order to reinstate the strikers' previous positions. During the middle of November, Continental hired its first 40 pilots.

While hiring at a rate of approximately 20 pilots per week, negotiations continued with ALPA and the other unions. In December, Professor Benjamin Aaron of UCLA was brought in to mediate the dispute. This mediation failed not on the issue of wages or work rules but on the issue of recall seniority rights.

The current status of the negotiations is that they are being conducted under the supervision of the bankruptcy court. Continental has advanced several creative proposals to ALPA in order to avoid the firing or permanent layoff of the new hires. These ideas include, for example, Continental and ALPA pooling some of the funds that both are spending on attorneys, and that ALPA is spending on strike benefits plus negative advertising, to bringing back more pilots than Continental now needs but who can be utilized as further growth occurs. ALPA is intransigent on having all new hires laid off or fired, and all of the Continental people who continued to work demoted; the talks remain deadlocked. Even after hearing the details of Continental's labor negotiations, some people ask why was it that Continental did not achieve settlement when agreements have been reached at other air carriers? The answer requires an historical perspective. When Continental was seeking the give-backs, it was unprecedented for a major carrier to ask for permanent restructuring of its labor costs. Only after the management and employees of other air carriers saw the pain of

Continental's bankruptcy were settlements reached at other carriers such as Eastern. It was simply Continental's misfortune to run out of cash first.

E. Court Proceedings:

After the filing of Continental's petition on September 24th, and the subsequent emergency motion to reject the existing labor contracts filed on September 26th, the airline's unions filed a motion to dismiss Continental's Chapter 11 petition on October 11, 1983. The unions further sought and were granted separate trials on both the union motion to dismiss and the Continental motion to reject its labor contracts.11/

After the completion of extensive discovery, trial was held on the unions' motion to dismiss beginning on December 5, 1983. The trial consumed 11 days with several sessions continuing until midnight and one session concluding in the early morning hours. On January 17, 1984, the bankruptcy court ruled that Continental had filed its Chapter 11 petition in good faith and rejected the unions' motion to dismiss.

11/ It is interesting that the unions waited three weeks before even filing an answer to Continental's motion to reject union contracts. It is also curious that the unions sought separate trials on the issue of Continental's good faith in filing for reorganizaton and on the question of contract rejection, although the same facts will be determinitive on each issue. Indeed, it would almost appear that the unions hope to delay final judicial resolution of these issues on the chance that some relief may be forthcoming from the Congress.

The hearing on Continental's motion to reject the union contracts began on January 30, 1984. The hearings are still continuing -- nearly 10 weeks later. While Continental is confident that the court will grant our motion to reject its union contracts, we are not now able to predict when the court's decision may be expected.

V. CONTINENTAL'S VIEWS ON THE PENDING LEGISLATION TO AMEND THE BANKRUPTCY CODE:

Mr. Chairman, may I say that it was unfortunate that our financial difficulties coincided with the pendency of this bankruptcy legislation. My attorneys tell me there is a saying that hard cases make bad law. I am afraid that the unions would like to make some bad law citing Continental's hard case.

Mr. Chairman, one of the basic messages of the unions has been that Continental was not really a company facing financial disaster, but that we filed for reorganizaton solely to rid ourselves of our union contracts. The unions go on to argue that the law must be changed to stop the "abuse" of the Bankruptcy Code that is illustrated by our bankruptcy filing.

This thesis is just wrong. I cannot imagine a company eagerly embracing a bankruptcy reorganization under any circumstances, much less solely to rid itself of labor contracts. No management wishes to lose control of its company to a court. Equally inhibiting is the fact that as Texas Air Corporation is a major shareholder of Continental, there was and is the realization that the plan of reorganization can result in substantial dilution of Texas Air corporation's and individual shareholders' interests.

Moreover, the law guards against such abuses by requiring that petitions for reorganization meet a "good faith" test, which I understand to be a jurisdictional threshold for the bankruptcy court. In our case, the bankruptcy court found, after an extensive hearing, that Continental was in extreme financial distress on September 24, 1983, and that reorganization was the only viable alternative left to us.

Mr. Chairman, if there are any cases of companies abusing the Bankruptcy Code to rid themselves of union contracts, the Continental bankruptcy reorganizaton is simply not one of these cases.

Since the decision of the Supreme Court in Bildisco and Bildisco v. National Labor Relations Board, ____ U.S. ___, 104 S. Ct. 1188 (February 22, 1984), there has been increasing pressure on the Congress to make significant changes in the existing law regarding the rejection of collective bargaining agreements in bankruptcy proceedings. This pressure has spurred the adoption by the House of Representatives of several provisions in H.R. 5174, that would, in essence, reverse the Bildisco decision and make substantial changes in the current law regarding the rejection of labor contracts. Similar legislation, S. 2462 introduced by Senator Kennedy on March 22, 1984, is pending in the Senate.

Continental is of course deeply concerned about any legislative action which could impact on its pending Chapter 11 proceeding. By virtue of our experience under the present law, we also have some suggestions to make regarding areas in which amendments could improve the present laws and further the purposes of Chapter 11, which, as put so well by Judge Wheless in our case, are to "give a business an opportunity to catch its financial breath, propose a plan to reorganize and to thereby allow it an opportunity to cure its financial ills and continue in business." (Memorandum Opinion at 8.) Therefore, Mr. Chairman, I will address three issues relevant to the Senate's consideration of the House collective bargaining agreement provisions: (1) retroactivity; (2) the standard for rejecting collective bargaining agreements; and (3) an expedited process for determining whether union contracts should be rejected.

A. Retroactive Application Of The Changes In The Bankruptcy Code Included In The House-Passed Legislation Would Destroy Continental:

The House-adopted amendments relating to the rejection of collective bargaining agreements are prospective only in their application. Specifically, these provisions apply only to those Chapter 11 reorganizations filed after the date of enactment of H.R. 5174.

If the House provisions were made retroactive to cover pending Chapter 11 reorganizations, as some unions are urging, the prohibition against altering union contracts prior to a court decision and the removal of the "relation back" doctrine of the Bildisco test would force the liquidation of Continental. These two provisions, if applicable to Continental, could force Continental to pay back wages to all union members from September 26, 1983, to the date the court rules on Continental's rejection of our union contracts, even if the court rules with Continental. The bankruptcy court has already ruled that Continental had no other alternative but to file for reorganization if Continental were to have any chance of remaining in business. Since our high labor costs were one of the factors forcing Continental into financial distress, being required now to pay these high labor costs as back wages would mean Continental's liquidation and the loss of the 8,000 jobs and the service Continental is providing to 62 cities throughout the world today.

In addition, the retroactive application of any new bankruptcy rules regarding collective bargaining agreements would extend our litigation, lengthen the time before a reorganization of Continental is completed and jeopardize the success of that reorganization. Continental complied with every requirement of existing law at the time of its bankruptcy filing. Retroactive application of a new law in order to "penalize" Continental, as some unions would like, simply cannot be justified from any public policy perspective.[12]

I urge retention of the House provision that makes any changes applicable only to reorganizations filed after the date of enactment.

B. The Standard For Rejecting Collective Bargaining Agreements In Bankruptcy:

By a unanimous decision, the Supreme Court in Bildisco determined that the appropriate standard for rejecting collective bargaining agreements in bankruptcy proceedings is the more flexible weighing and balancing standard articulated by the Third Circuit Court of Appeals in In Re Bildisco, 682 F.2d 72 (3rd Cir. 1982). The House amendment would change that standard to the stricter standard of the REA Express case -- a standard that was rejected unanimously by the Supreme Court.[13] In fact, our attorneys believe that the House provisions may be interpreted to be even stricter than the REA Express standard.

Mr. Chairman, we believe that the Congress has correctly provided a flexible system for the judicial supervision of business reorganizations. No two company reorganizations are exactly alike. We know with certainty that the requirements of a successful airline reorganization are quite different from the reorganization of a manufacturing concern. For instance, certain manufacturing concerns may be able to afford a shut-down of their operations for a few weeks without losing the confidence of the buying public. Airlines, on the other hand, may only be able to shut shown for a very short while without losing public confidence.

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[12] There are hundreds of other companies that could be similarly impacted because their plans of reorganization have not been confirmed or because they are on appeal. See Attachment G for a state-by-state breakdown of such companies.

[13] Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), cert denied, 423 U.S. 1073 (1975).

The Bildisco standard has other important attributes. Continental was only 50 percent unionized. The Bildisco standard allows the court to treat all employees equally while the REA Express standard gives union workers a preferred status over non-union workers. Similarly, the Bildisco standard allows the court the flexibility to save as many jobs as possible. For example, a company might be able to survive by selling a large block of its assets, however, this asset sale would be at the expense of abolishing jobs. The Bildisco standard allows the court to weigh all of these factors and maximize jobs. The REA Express standard by contrast could be invoked to force the sale of assets to protect the wage levels of the union employees to the detriment of all employees.

The Bildisco standard is consistent with the flexibility Congress has carefully built into the Chapter 11 reorganization process. We encourage the Senate not to abandon too quickly a standard that was so recently confirmed by a unanimous Supreme Court after extensive briefing and oral argument.

C. An Expedited Process For Determining Whether Collective Bargaining Agreements Should Be Rejected:

Mr. Chairman, Continental Airlines desired an early ruling on our motion to reject our union contracts. We asked the court on September 26, 1983, to expedite the consideration of this issue. Six months later we have not yet even completed the hearings on our motion. This has greatly delayed the filing of a plan of reorganization.

We believe that an early hearing and decision on this issue would avoid much of the tension between labor and management that has marked the Continental reorganization, and pave the way for the unions and management to reach agreement on new wages and work rules.

The House amendment includes an expedited procedure that provides for a hearing on a motion to reject a collective bargaining agreement within 7 to 14 days after the motion is filed. The essential problem with the House proposal is that there is no requirement that the bankruptcy court render an expedited decision. Based upon Continental's experience, it is our belief that there is a sensible procedure that will fairly accommodate all interests and which would only require minor modifications to the procedural aspects of the House-passed legislation.

Mr. Chairman, we would like to recommend that your committee consider the following approach to an expedited process provision. The debtor-in-possession or the trustee should be permitted to file a motion to reject supported by substantial evidence both as to prior bargaining in good faith and the need to reject the contract. The court would then hold an expedited hearing on the motion, commencing not less than 7 days and not more than 10 days after the filing of the motion. The court would be required to conclude the hearing and rule on the motion not more than 14 days after the motion was filed. Failure by the court to meet this deadline would result in automatic rejection of the collective bargaining agreement.

In making a decision, the court should determine whether the preponderance of the evidence showed it was more equitable for all of the affected interests to reject the contract. Until the rejection is approved, or occurs because the 14 days has expired, the union contract would be an administrative expense. Afterwards, of course, it would become an unsecured claim subject to being satisfied as part of the plan of reorganization.

The party who loses in the expedited hearing could either seek review of such decision in the appropriate U.S. district court or seek a rehearing on the motion to reject before the bankruptcy court. Either of these hearings would be a trial *de novo* and be preceded by full discovery. However, during this time, the bankruptcy court's initial decision on the rejection could not be stayed.

In essence, this proposal would require the court to address very quickly the questions of whether or not the company properly filed in bankruptcy and whether or not there is a need to reject the union contract. If the company is acting improperly, then the court may so find. Because the union contract is, during the short period of time until the moment of rejection, an administrative expense, the union members are fully protected.

While it is clear that the reorganizing company would bear some additional expense and risk in following this procedure, this expense may be necessary in order to reconcile the national interest in preserving the collective bargaining process with the national interest in reorganizing the company, saving the jobs, and protecting the interests of creditors. It disadvantages the non-union workers, creditors and shareholders to the extent that the union contract is made an administrative expense of the debtor.

VI. CONCLUSION:

Mr. Chairman, let me conclude by saying that Continental would have ceased to exist but for the option of reorganization. We are confident that Continental will survive reorganization and return to financial health, providing 9,000 jobs by June, air service to millions of Americans, access to cities at significant savings, value to our shareholders and repayment of our debt to our creditors. Our experience indicates that an expedited process for determining whether union contracts should be rejected would be in everyone's best interest -- if the process will result in in expedited judicial decision.

Finally, Mr. Chairman, we urge the Senate to apply prospectively only any changes to the bankruptcy law regarding the rejection of collective bargaining agreements. The retroactive application of some of the House provisions could force the liquidation of Continental -- which would be grossly unfair to our 8,000 employees, our creditors, our shareholders and the flying public of this country.

Thank you, Mr. Chairman.

ATTACHMENTS TO THE TESTIMONY OF FRANK LORENZO

A. Memorandum Opinion of the Bankruptcy Court, January 17, 1984.

B. Fact Sheet on Continental.

C. System Expansion and U.S. Cities Currently Served by Continental.

D. Consumer Response to the New Continental.

E. Comparison of Continental's Pilot Contract.

F. Selected Editorials from Newspapers in Continental's Service Area.

G. Public Companies Filing Chapter 11 Petitions.

(Editor's Note: Due to printing limitations and in the interest of economy, Attachments F and G (above) were retained in the files of the Committee.)

ATTACHMENT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	CASE NO.
CONTINENTAL AIRLINES CORPORATION	§	83-04019-H2-5
Debtor	§	
IN RE:	§	
CONTINENTAL AIR LINES, INC.	§	83-04020-H1-5
Debtor	§	
IN RE:	§	
TEXAS INTERNATIONAL AIRLINES, INC.	§	83-04021-H3-5
Debtor	§	
IN RE:	§	
TXIA HOLDINGS CORPORATION	§	83-04022-H3-5
Debtor	§	

CONSOLIDATED CASE NO.
83-04019-H2-5

January 17, 1984

Memorandum Opinion On Motion To Dismiss

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	CASE NO.
	§	
CONTINENTAL AIRLINES CORPORATION	§	83-04019-H2-5
	§	
Debtor	§	
	§	
IN RE:	§	
	§	
CONTINENTAL AIR LINES, INC.	§	83-04020-H1-5
	§	
Debtor	§	
	§	
IN RE:	§	
	§	
TEXAS INTERNATIONAL AIRLINES, INC.	§	83-04021-H3-5
	§	
Debtor	§	
	§	
IN RE:	§	
	§	
TXIA HOLDINGS CORPORATION	§	83-04022-H3-5
	§	
Debtor	§	

CONSOLIDATED CASE NO.

83-04019-H2-5

January 17, 1984

Memorandum Opinion On Motion To Dismiss

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On September 24, 1983, Continental Airlines Corporation and the above-related entities filed a voluntary Chapter 11 proceeding under Title 11 of the United States Code. On September 27, 1983, Continental Air Lines, Inc., and Texas International Airlines, Inc. filed a joint motion to reject their Collective Bargaining Agreements and other employee-related executory contracts. On the 11th of October 1983, three of the debtors' unions (representing approximately one-half of the employees of Continental Airlines) jointly filed a motion to dismiss the proceeding; alleging as their principal ground that the Chapter 11 was filed in bad faith and further alleging that rejection of these contracts would violate the United States Constitution.

Immediately upon filing its Chapter 11, Continental Airlines unilaterally imposed on its employees new wage rates and work rules which had the effect of making those costs comparable with those of "New Entrant" airlines who are in competition with Continental. It also cut back severely on its operations.

The unions filing the motion to dismiss were the Air Line Pilots' Association ("ALPA"), the Union of Flight Attendants ("UFA"), and the International Association of Machinist and Aerospace Workers ("IAM"). The debtors and the Unsecured Trade Creditors Committee have opposed the motion.

The evidence taken at the hearing on the motion to dismiss consumed 11 days of testimony, including two evening sessions to 10:00 p.m.; two evening sessions to 12:00 p.m.; and one evening session to 1:15 a.m. A considerable amount of evidence in oral and in written form was introduced. Both parties have filed extensive briefs. The oral arguments extended for approximately 4 hours. The matter has been thoroughly presented to the court by all parties.

The evidence showed that since the airlines were deregulated in 1978, Continental Airlines (and Texas International when considered on a combined basis) has lost money consistently. Up to September 24, 1983, the date of filing, Continental Airlines had lost $521,900,000, as follows:

1979	lost	$ 27.4 million
1980	lost	76.8 million
1981	lost	138.6 million
1982	lost	119.9 million
1983 to September 24	lost	159.2 million
		$521.9 million

These losses were caused in some part by the fact that the new entrant airlines have lower labor costs and can and did charge lower fares than Continental could charge and still make money on routes where they were flying in competition. The new entrant airlines have increased these competitive routes in the past several years and have even run Continental Airlines out of some markets.

The unions have not challenged the fact that Continental Airlines has lost substantial sums of money; nor that the company was in a severe financial crises at the time of the filing. In fact, ALPA and UFA both indicated in testimony that they were willing to agree to the dollor amount of the labor cost concessions which had been requested of them by the company, and indicated that agreement to these concessions (which they were not lawfully required to make) was motivated by the recognition of these two unions that Continental Airlines was having a significant financial crises. However, although efforts had been made to get agreement on concessions since the first of the year and longer, no agreement had been reached with these unions at the time of the filing of this proceeding.

The IAM appeared to be taking the position that the financial condition of the company was not a significant element of consideration in negotiating for their new contract. The IAM had refused an increase of wages in their agreement with Continental Airlines and held out for what they termed "industry standards"; even though the rates requested were highter than with many other carriers. On August 13, 1983, the IAM struck the airlines. Its purpose was to shut down its operations. It is still on strike.

The unions did offer testimony that Continental had weathered a bad cash crises in the winter of 1982-83 and argued that this crises was much worse than the cash crises of the airline at the time of filing of the proceeding. The unions argue that this comparison shows that Continental Airlines could have survived its cash predicament of September 1983 had it chosen to do so. However, while Continental Airlines' cash position was worse in the winter of 1982-83, it nevertheless had resources which it did not have in September 1983. It had unencumbered assets which it sold for cash, and it was projecting an upswing in its profit picture. This enabled it to obtain credit from several sources.

Texas Air Corporation, an affiliate, purchased City of Houston Bonds on which Continental Airlines was principal obligor. This raised $7.75 million for the debtor. The debtor sold a subsidiary for $15 million. The debtor obtained $25 million revolving credit from major lenders. It obtained $37.5 million in April 1983 by public offering and $40 million from American General Corporation by a secured loan. These transactions enabled Continental Airlines to survive its cash crunch in the winter of 1982-83.

By September 24, 1983, Continental Airlines had sold its free assets. It had experienced severe losses in 1983 instead of gains it has been predicting and had no optimistic outlook for the future. It had lost $23 million in the July-August period, traditionally its most favorable period of operations, and was facing the winter season, traditionally a poor season in the airline industry.

At filing, Continental Airlines was unable to pay its debts as they matured. The company had $42 million in unsecured trade debts which it had not paid timely and which it could not pay in full. It was in violation of the liquidity provisions of its loan agreements with secured lenders and was facing substantial payments of interest and principal on its secured loans in the near future; which it had no means to pay. It was projecting that even under favorable assumptions that it would run out of cash by the end of September 1983. It had no reasonable source of additional capital; given its profit and loss history, its existing cost structure, and the industry competition it was facing. It had no credit. It had not yet reached agreement or deferral of some of its principal payments and had been refused deferral of interest payments on its secured debt. Many of the trade creditors had threatened to cut off services. Had this occurred, the airline service could have been interrupted involuntarily and public confidence would have eroded rapidly and might never have been restored.

It had made efforts to obtain adjustments in its existing collective bargaining agreements but the unions were not required to agree to these requests and no agreement had been reached. Indeed, the adjustments which had been requested would no doubt have required substantial reduction in pay and work benefits for these employees, and it can be seen why these adjustments were not readily acceptable to ALPA and UFA; especially in light of an apparent feeling of distrust of management.

The evidence showed that there was no way for Continental Airlines to repay its obligations nor even to continue its operations for very long in the future, as things then existed. Had the airline not filed its Chapter 11 proceeding when it did, it would not have been flying for very much longer, its 6,000 remaining employees would now be out of a job or working elsewhere, and its ability to reorganize would have been further seriously impaired.

This court finds that the Continental Airlines group filed their respective Chapter 11 proceedings for the purpose of attempting to keep the companies alive and functioning and that they had no other viable alternative to that end. The unions have not satisfactorily demonstrated that there was any reasonable alternative under which the airline would keep operating,[1] and this court finds that there was none.

Further, had not Continental Airlines filed their Chapter 11 proceeding when they did, an involuntary proceeding might well have been filed against them, and, as they were not paying their debts as they matured, an order for relief would have been entered. The Unsecured Trade Creditors Committee has advised that if this proceeding is dismissed, the Committee will instantly file such an involuntary proceeding.

This court would reject any argument that a financially troubled company, which is losing money and is insolvent (or nearly so), is unable to pay its debts as they mature, has no credit and no free assets, and is about to run out of cash;

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[1] Presumably the Unions do not argue that Continental Airlines could not have filed a Chapter 7 liquidation proceeding; which would have resulted in a shutdown of operations, an immediate loss of all jobs of all employees and would further result in a rejection of all collective bargaining agreements as a matter of law 60 days after filing, unless assumed by a trustee as being beneficial to the estate. A non-operating trustee could not have properly done this. Most certainly, this alternative would not have served the purposes of the Railway Labor Act.

nevertheless, cannot file a Chapter 11 proceeding if rejection of its collective bargaining agreements is a planned element in the reorganization of its business.

If Congress had the intention to prohibit such filings when it enacted the Bankruptcy Code, it did not make this intention clear to this court. Indeed, this court feels that the Railway Labor Act and the Bankruptcy Code are compatible. Each has a special and a separate purpose. Congress enacted the Bankruptcy Code in 1978, effective October 1, 1979. A number of cases had already held that collective bargaining agreements can be rejected by a Chapter 11 debtor under the provisions of the prior Bankruptcy Act under certain circumstances. But the Congress did not see fit to provide otherwise in the language of the Bankruptcy Code. This must have been intentional on the part of the Congress; although differences still exist among authorities as to what circumstances are required to be shown before such agreements can be rejected.

However, the unions state that they are not making the above-mentioned argument. They argue that the sole, or at least the primary purpose in filing was to reject these agreements and that Continental Airlines has not shown that it intends to reorganize through and by a Plan of Arrangement. This court has determined the facts to be contrary to this proposition. The debtors have shown themselves to have a need for this proceeding in areas other than with respect to collective bargaining agreements.

The court finds that Continental Airlines filed this proceeding only when management felt it had no acceptable alternative if it were to have a chance to keep the airline flying; the court further finds that there was no intent or motive to abuse the purpose of the Bankruptcy Code. One of the purposes of the Bankruptcy Code is to give a business an opportunity to catch its financial breath, propose a plan to reorganize and to thereby allow it an opportunity to cure its financial ills and continue in business. No small part of this purpose is to preserve jobs. The objectives of the debtors were to make lawful use of the provisions of Title 11 of the United States Code to this end and such objectives were therefore consistent with the purposes, spirit, and intent of that statute. That one of the intentions of the debtors was to seek rejection of their collective bargaining agreements insofar as that may be allowed under the provisions of Title 11, does not, under these facts, result in the filing being "in bad faith" as that term is defined at law. Neither the sole nor primary purpose of the filing was to reject these executory contracts; although it is clear that at filing Continental Airlines expected to be able to do this under the provisions of that law.

This court rejects the notion that the filing was "engineered" over a period of time by management as the means by which it could reject these contracts. The primary purpose in filing these proceedings was to keep the airline operating so as to best utilize its going-concern value. The management of the company owed this obligation to its shareholders and to its creditors.

This court declines to determine the issue of the constitutionality of rejection of collective bargaining agreements under the provisions of 11 U.S.C. §365. This issue is not now directly before this court but will be determined as part of the debtors' effort to reject these agreement beginning January 30, 1984 at 9:00 a.m., 5th Circuit Court of Appeals Courtroom, 11th Floor.

Since ALPA & UFA have indicated that they were in agreement to the dollor amount of concessions requested by Continental Air Lines, the debtor is requested to present to these unions a definitive proposal as an offer of settlement of the issues relating to rejection of the union contracts. All parties must be prepared to certify that all settlement negotiations have been exhausted by the time of the commencement of trial on January 30, 1984.

The motion of the unions to dismiss these proceedings is denied.

R.F. Wheless Jr.

R. F. Wheless, Jr.
Bankruptcy Judge

Attachment B

CONTINENTAL AIRLINES

FACT SHEET

- Continental Airlines Corporation, headquartered in Houston, is 85 percent owned by Texas Air Corporation.
- Continental Airlines and Texas International Airlines consolidated operations October 31, 1982, retaining the operating name of Continental Airlines.
- Continental Air Lines filed for Chapter 11 reorganization September 24, 1983. Service to international routes continued uninterrupted, while domestic service was temporarily suspended.
- Continental currently employs approximately 8,000 people.
- Continental's fleet consists of 105 aircraft, including 60 Boeing 727s, 34 McDonnell-Douglas DC-9s and 11 DC-10s.
- Continental operates an average of approximately 300,000 plane miles daily.

Attachment C

CONTINENTAL AIRLINES - SYSTEM EXPANSION SINCE SEPTEMBER 24, 1983

After filing for reorganization under Chapter 11 of the Bankruptcy Code on September 24, 1983, Continental temporarily suspended all its domestic services. Continental resumed flying on September 27, and has steadily rebuilt its system since that date. The following chart illustrates the growth in Continental's post-reorganization service, expressed as a percentage of pre-September 24, 1983, capacity.

Date	Percentage of Prior Capacity
9/27/83	27.1
10/30/83	39
11/15/83	50
1/15/84	56
2/ 1/84	64
3/ 1/84	75
4/ 1/84	85

Domestic Cities Served - April 10, 1984

Austin
Baton Rouge
Burbank
Chicago
Cleveland
Colorado Springs
Corpus Christi
Denver
Detroit
Ft. Lauderdale
Houston
Kansas City
Lafayette
Los Angeles
McAllen
Miami
Minneapolis/St. Paul
Newark
New Orleans
New York
Oklahoma City
Omaha
Orlando
Philadelphia
Phoenix
Portland
Salt Lake City
San Antonio
San Diego
San Francisco
Seattle/Tacoma
Tampa
Tulsa
Washington, D.C.
Wichita

Attachment D

CONSUMER RESPONSE TO CONTINENTAL AIRLINES NEW SERVICE

Continental returned to the air after filing for reorganization under Chapter 11 with a new low fare philosophy. The new service has been enthusiastically received by consumers. Through February, over 2,000,000 passengers had flown on the new Continental. Consumer savings by virtue of Continental's low fares total in excess of $300 million in just six months.

The following figures reflect the success of Continental's services:

Month	Load Factor*	Revenue Passenger* Miles	Available Seat*** Miles
October	65.3%	384,525,000	588,969,000
November	62.9%	429,094,000	682,383,000
December	66.8%	544,744,000	816,086,000
January	65.1%	577,900,000	887,500,000
February	63.5%	615,159,000	969,465,000

* Load factor represents the percentage of seats filled on an airline's flights.

** Revenue passenger miles represent one fare-paying passenger flown one mile.

*** Available seat miles represent and airline's capacity (one seat per one mile flown).

Attachment E

NEW CONTINENTAL'S CURRENT PILOT CONTRACT MEETS OR EXCEEDS THE PILOT CONTRACT SIGNED WITH BRANIFF INTERNATIONAL AIRWAYS AND IS BETTER THAN CONTRACTS OFFERED BY CERTAIN OF CONTINENTAL'S COMPETITORS

	New Continental	ALPA/ Braniff Agreement	Average New Airline
Salary-- Captain:	$43,000	Up to $43,000	$28,000 to $43,000
Pilot Officer:	$28,000	$26,00-$31,500	$15,000 to $28,000
Benefits:	Group Medical Life Insurance	Same	Same
	Company Paid Short-Term Disability Plan	Same	Same
	Up to 3 Weeks Vacation Per Year	Up to 2 Weeks Vacation Per Year	Average 2 Weeks Vacation Per Year
Profit Share:	15% to 25% of All Earnings, Before Tax, to Employees	10% of Earnings Before Tax, After First $30 Million of Profit	Varies Substantially
Stock Ownership:	Pilots Share in Distribution of 1,000,000 Free Shares Granted to All Employees. Plus Option to Buy 1,000,000 Shares	None	Varies Substantially
Work Rules:	1,000 Hours Maximum flight Time Per Year	Same	Same
Maximum Scheduled Duty Period:	14 Hours	Same	Same
Other Work Rules:	More Conservative than Federal Regulations	Varies	Varies
Average Time Off Per Month:	14 Hours	Not Yet Applicable	Varies 8-14

The **Chairman**. Thank you, Mr. Lorenzo. I can see that you feel deeply about this, as you should. It is a tremendous problem.

The facts that you have given me, as you have stated them in your case, it seems to me, would satisfy any standard for the rejection of labor contracts. Do you disagree with that?

Mr. **Lorenzo**. Mr. Chairman, let me just start on that——

The **Chairman**. I do not see how the facts you have given me would not satisfy that standard, any standard.

Mr. **Lorenzo**. We have been advised that under the toughest standards, Continental's failure would allow and permit labor contract rejection. That is what we have been advised. However, there is a long way from that and retroactively going and retrying cases——

The **Chairman**. What you are afraid of, is it not, is that with you now coming out of it, because of the unilateral abrogation and the fact that you were able to go beyond the union and resurrect this company, that now that you are coming out of it, some bankruptcy judge might turn around and say, "You can now go back to the collective bargaining agreement." But you really could not, because it would involve all kinds of back-pay issues and all kinds of other issues. I do not see how any judge could decide against you on this issue.

Mr. **Miller**. Senator, on the ultimate question of the rejection of the collective bargaining agreement, initially it was Continental's position that it could satisfy the REA standard.

The **Chairman**. I think you could.

Mr. **Miller**. But when you look at the Rodino bill, Mr. Chairman, the section that says "absent rejection, the jobs covered by such agreement will be lost, and any financial reorganization of the debtor will fail," that section only applies to the union jobs. A very substantial portion of Continental's work force is nonunion. Does that mean that the nonunion employees have to take a very substantial hit to their compensation, reduce their benefits? If they do, you might be able to reinstate the union contract. Does that mean the secured creditors have to give up their collateral security? That the unsecured creditors and the suppliers——

The **Chairman**. I would not think so, if you have some sort of balancing-of-the-equities provision.

Mr. **Miller**. If you have a balancing-of-the-equities provision, Mr. Chairman. But if you go back to the *REA* standard, as Congressman Rodino's bill provides, then we have a real problem.

The **Chairman**. We do not intend to do that. I think you have seen copies of the compromise. It did open up the issue so that the pilots' association, the machinists' unions if they wanted to, they could try to overcome or meet that burden of proof. It would be an exceptional burden of proof they would have to meet in order to overcome *Bildisco* or to overcome a balancing-of-the-equities standard. I do not think they could do that.

Mr. **Onstad**. Mr. Chairman, if I may on that point. We brought with us today and would be glad to furnish for the record a letter from our counsel in the bankruptcy court, Mr. Jack Gallagher, indicating that when the *Bildisco* case came down, we changed our trial tactics. In other words, we decided to forego witnesses we otherwise would have called, witnesses we would have cross-examined, which otherwise would have been called in an effort to prove that we could meet the *REA* standard. We would have to go back and retry a significant portion of the case.

The **Chairman**. I understand that.

Mr. **Onstad**. There is another part here about the compromise that is troublesome. No. 1, the minimalist approach that says that at the beginning you have to go back and see that you have a minimal taking from your unionized employees and at the same time get something from your creditors, that is not the approach we have followed here. We have dealt with our creditors before we went into bankruptcy, and then we dealt with our unionized employees and our nonunionized employees, first during 2 years of collective bargaining and then after we went into bankruptcy, trying to figure out how much money it would take to run this company.

One of the really troublesome things was, we calculated the compromise bill, and we come to 148 days of cash that the company would have to have when they went into bankruptcy to survive the process that has been erected here. One of the things we do not know is, where does this process begin to get us. Does it get us in the front-end load of minimalist standards? If you look at the appeal all the way to the Supreme Court and you assume 30 days of negotiations, and you get 148 days of cash you need, sir.

Mr. **Miller**. I would add, Mr. Chairman, I am not sure Mr. Onstad is correct. I do not know what the bill provides in terms of appeal to the Supreme Court of the United States. Unless you are going to expand the jurisdiction of the Supreme Court, it is still going to be subject to the petition-for-certiorari process, which would extend that 148 days.

The **Chairman**. You are going to have 15 days, according to the compromise. So it may be unrealistic, but the Supreme Court is going to have to meet that. Now, they could come out and say that is unconstitutional because it is an unreasonable restraint. I suppose they could do that, but I do not think they would have a very good argument under the circumstances.

Mr. **Lorenzo**. Mr. Chairman, if I could just add one thing further on your question that the situation would be so horrendous that it is not likely that the court could not approve the rejection of the contracts at this stage. That was the import of your question?

The **Chairman**. My question was basically centered on the fact that no matter what the standard, you could meet it based upon your circumstances at the time that you unilaterally abrogated your collective bargaining agreement.

Mr. **Lorenzo**. Mr. Chairman, I believe you also made a point that the circumstances would be so onerous that no court is likely to not reject the contracts at this stage.

The **Chairman**. I cannot conceive of any court, bankruptcy or otherwise, that would reverse what you have done.

Mr. **Lorenzo**. I would only like to add, No. 1, that I agree with you. But No. 2, the reason why I agree with you is not because of just the reversal. It is because of the financial facts of our situation. We have a judge that for 6 months has seen an absolutely failing company turned around, make a major change in its profit-and-loss statement, make a major change in its cost structure, and then all of a sudden be able to be competitive. Now that it has competitive costs and has just seen virtually overnight a dramatic change in the posture of the company but realizes that indeed it is very frail. There is no enormous build-up of cash in the company, that is for sure.

The **Chairman**. I agree with you. I would have to say that the judge would have to rule, even if date-of-enactment language was used, that you people did what was right under the circumstances, that you basically helped to pull this company right out of the mud and made it at least a flying company again, even though you have a lot more raindrops to go through.

Mr. **Lorenzo**. Assuming that we survived from the point of passage until that point, which is not something you can assume, given the new uncertainties that would be in the situation.

The **Chairman**. What you seem to be saying is, you are concerned about having to go back through this litigation again. You are not sure what kind of decisions the court might make. He might modify what has presently been done. You could have all kinds of dislocations. I agree, it is an uncertainty.

Mr. **Miller**. And in the chapter 11, Mr. Chairman, you have relationships with different constituencies. You have a labor committee, an unsecured creditors' committee, a secured creditors' committee, a public debenture holders committee. All of those relationships are very tenuous. Whenever something happens that is unanticipated in the chapter 11, you lose their confidence, and confidence is a major part of having the ability to reorganize under chapter 11.

On the date of enactment, there is an inconsistency that I see in the union position. The union has taken the position that date of enactment should be left to the court to construe, and if the court determines that there is a manifest injustice, the court will not apply the date of enactment. That is OK; there, the court is qualified to find the manifest injustice. But on the other hand, the union says the court is not qualified to balance the equities. I find a real inconsistency there.

The **Chairman**. I do, too. This compromise we had was not a straight balancing-of-the-equities vis-a-vis *Bildisco,* but it came pretty close to being that. It was tilted toward the unions, there is no question about it, because of requiring the minimal modification language.

Mr. **Lorenzo**. Mr. Chairman, when all is said and done, why does the Senate come forward and even think that there is any logic in spanking Continental Airlines?

The **Chairman**. The Senate does not feel that way. I will tell you what our problem is. Our problem is that this bankruptcy bill is a crucial bill, but it is in danger of falling, and I suspect it will, unless somehow or other we can get the parties together. The demands have been made by the unions. They want at least a fair shot to be able to make their case, I suppose against you or any other pending case where the issue has not already been decided.

My personal belief is, the language that we have agreed to in the compromise gives you a fair shot, too. Let's face it, *Bildisco* would be even more fair, because this is somewhere between *Bildisco* and *REA*. I do not see how any judge in the world could look at Continental's situation and what you people have done and reverse that, or overrule that, or modify it. I just do not see how they can.

Where I do see difficulty to you is having to relitigate and face their arguments that you could have done it at the same rates that they were charging, which I think is ludicrous.

Mr. **Lorenzo**. No judge will, but Senators would consider overturning the work of a company that has lifted itself up by its bootstraps?

The **Chairman**. You are looking at it through your eyes, and I do not blame you. This bill involves all kinds of things. It involves a major restructuring of the whole bankruptcy system of this country. We have been trying to do that for years and years and years here. We are that close to getting that done. It involves 85 new judges that literally are needed by the system.

We passed out about 300 judgeships when Jimmy Carter was President, because we knew the system needed it. If you really want the truth, I really believe that is part of the reason why we are being slowed down here: Because they are so afraid that Ronald Reagan is going to appoint these judges. Well, we were afraid Jimmy Carter was, but we did it because we wanted to do what is right for the system. We could have held up those. We held up 17 or 18 judges in the last month before the election, and that was agreed upon by both sides that it was what we should do. We passed everybody through there; it was just awful what happened, in some ways, in the eyes of certain people here.

We have 227 bankruptcy judges. We have other aspects of this bill that are crucial to certain free enterprise interests in this country that need changes in the law in order to survive themselves. So it is not just Continental. That is what you have to understand. We do not want to see Continental hurt. I do not want to see the airline pilots hurt. I would like to see things operate on an even keel. But you can just rest assured, none of us wants to see Continental hurt. It is a question of what can we put together to save this package.

You heard the unions today. You heard the chamber of commerce today. Those are the two extremes: I would say the AFL–CIO and the chamber of commerce. It is a question of what can we put together in order to resolve these problems that are crucial to this country, or whether the Federal courts are just going to have to go ahead and appoint magistrates or special masters to take care of all the bankruptcy cases in this country and place additional burden on already burdened Federal district court judges because we will not get them the companions they need on the bench to run the judicial system of this country.

So I sympathize with your position, and I worry about it. I do not know how to resolve it, except that is why we fought so hard, to make sure there was some consideration for you, there, in having that balancing-of-the-equities approach. You also, since you made an offer to them, have met the minimal-modification standard. It seems to me, a judge would have to recognize that.

I understand that the date-of-enactment provision has been interpreted by the U.S. Supreme Court to apply to pending cases unless manifest injustice will occur. Now, if the entire purpose of chapter 11, that particular proceeding; namely, rehabilitation of the business, that is the purpose of chapter 11, if that entire purpose would fail due to the application of the Bildisco bill to the pending case, I am confident that the courts will not apply the new law in such a way as to defeat the purpose of the Bankruptcy Code. Moreover, if a bill were passed which preserved the current standard for rejection of contracts, its application to all current cases would not amount to any change at all. Pending cases would be litigated under the same legal requirement.

I do not blame you for being upset. I do not blame you for worrying about it. And I do not blame you for not wanting it to happen. If there was some way I could resolve this problem so that everybody is happy, so that nobody has to give or be hurt, I would love to do that. But I just do not know how to do it, other than to try and bring all the parties together. When you do that, it is probably a good compromise where everybody is a little bit upset. I just do not know how to do it, but I am interested in any ideas that you or your associates can give to us that might help us to get around some of these problems.

I would be happy to listen to any idea. We are open. We have been open to all sides in this issue. The compromise we put together was not done frivolously. It was over an extended period of time, day and night, and I have to admit that it was shot down by the two extremes in this issue. Not by you but by the two extremes. Go ahead.

Mr. ONSTAD. Thank you, Mr. Chairman. There seems to be a general view throughout the room today that the principal problem in terms of retroactivity is Continental Airlines.

The CHAIRMAN. Oh, there are other companies involved, too.

Mr. ONSTAD. I heard those other companies mentioned this morning.

The CHAIRMAN. Some are in worse shape than you will ever be, as far as the court case is concerned.

Mr. ONSTAD. That is right. We have attached, for example, our appendix G with a list of companies that are in bankruptcy. But there are a couple of points I think you ought to understand.

We filed for bankruptcy on September 24, after having advised the unions on September 23 that we would be going into bankruptcy that weekend unless we got an agreement. They could have been at the courthouse door and said, "Stop Continental Airlines. Your Honor, stop them." They did not even have a union lawyer at the courthouse door. We filed an emergency motion. We begged that court, Mr. Chairman, for a hearing on September 26. There was not a union lawyer there. They did not respond until October 11, and then they asked for two trials.

We have been put through this extremely long, excruciating process, in part because I personally believe that they were trying to change the rules in midstream, they stretched out the court process knowing that we were broke, so they would not succeed in this process. That is why, for example, they are paying $39.6 million in strike benefits out there. In effect, sir, they sat on their rights. They did not come forward in that courthouse and argue for their rights. And now they are trying to get redress before the U.S. Senate. I just ask you to give some consideration to that.

The **Chairman**. I do not know whether you know this, but what have your legal expenses been thus far which are attributable to this bankruptcy matter.

Mr. **Lorenzo**. I could not give you the exact number, Mr. Chairman, but they have been very substantial.

Mr. **Miller**. Mr. Chairman, the legal expenses of Continental are probably running at the rate of $2 million per month, and a good portion of that is directed to the trial of the labor matter.

The **Chairman**. $2 million per month?

Mr. **Miller**. That includes the creditors' committee, the secured creditors and all the other hangers-on.

The **Chairman**. I do empathize with you; there is no question about it. Like I say, we are at the end of this particular hearing. I note that all of the witnesses have agreed to get together and talk about this. This offers some hope. I am going to take them up on their willingness to work with us, and work with me in particular, for a reasonable solution.

Unfortunately, I just feel that there are some other hidden reasons, like the judgeships that really are needed and most of whom will not get through this year. If Walter Mondale or Gary Hart win the election, they will be appointing most of them. If Reagan wins, it should not make any difference anyway, except that I know some ideologues would not want him to have any judgeships, just like some ideologues on our side did not want Jimmy Carter to have any. But those of us on the Judiciary Committee passed those through. And we differed from a lot of them that went on that bench, but they were basically decent people, decent lawyers, with good reputations for the most part. Frankly, we were not going to malign them or President Carter in the process, as we tried to get this judicial system working. That is a part of the problem and one, I suppose, that ideologically people do have to worry about. I suspect that it is a lot more significant than people would care to know.

But then we have had fights between two unions, or between a variety of unions I guess would be a better way of saying it, and that is not easy to handle. So all I could say is, I am going to try to get every party together. I would appreciate any suggestions you have. I would get every party together to see what we can do to resolve this major issue and to get that bill passed.

Now, I do not know what impact it will have on you. I just do not want it to ruin your business, that is all. On the other hand, something has to be done to resolve it. I do not blame you a bit for the feelings that you have on this, and in fact I empathize with you.

Mr. **Miller**. Mr. Chairman, in terms of the ideal legislation, if one could call it that, I would refer to Mr. Minkel's testimony and the proposed legislation of the National Bankruptcy Conference submitted to Congressman Rodino. That is a proposal which attempts to deal with all of the problems which are raised.

I think the emotion which is attached to this issue clouds it. People begin to think of this issue in the context that it is either union or nonunion, and that is not really what it is all about.

The **Chairman**. It cannot really be thought of in that context.

Mr. **Miller**. Because even if you get approval of rejection, the union does not go away. The company has an obligation to bargain in good faith about a new contract. And besides that, as Mr. Lewis pointed out this afternoon, Mr. Chairman, the union has a claim. It could be a very substantial claim, and it is the most monolithic group of interested parties in the chapter 11. Taking into account the membership and the fact that they usually move as a unit, they may end up controlling the plan of reorganization. They may end up controlling the company. They may get the equity of the company and throw out management after the chapter 11 plan is confirmed. That union and its members becomes a very powerful force after rejection. It simply does not go away. It is there, and it becomes a major player in the chapter 11 process.

The CHAIRMAN. In other words, their rights are not gone just because you can unilaterally abrogate the agreement.

Mr. MILLER. Oh, no. As Mr. Lewis pointed out, you have to get two-thirds in amount and more than 50 percent in number of every class under the plan of reorganization. If it is a large union, as in the Continental case, they have a major position in the formulation of the plan of reorganization. In most of the large cases it is that way.

The statement was also made this morning, Mr. Chairman, that the unions and their membership are being penalized because they are being asked to contribute something that nobody else is contributing when a chapter 11 starts. That is not true, Mr. Chairman. Every creditor group is asked to contribute something, and they do contribute something when a chapter 11 starts. What happens to the creditors? Their payments are suspended. They may not see any payments for 1 or 2 years. The money that was going to be used to pay their claims is now the operating capital of the entity.

What happens to the secured creditors? They cannot exercise their remedial rights, they cannot get their collateral security, and in most cases they do not get any interest for a long period of time. So they are making a contribution. The public debenture holders are the same way: they do not get any interest, they do not get any amortization while the case is pending.

What the unions are saying is that the union members should not contribute anything. They should continue to get paid in accordance with the contract, and the same work rules which may drive the company into the ground, while everybody else is making a contribution. So it is not as the unions say; it is exactly the converse of what the unions say.

The CHAIRMAN. I agree with you. There is no question about that.

Mr. MILLER. I might add, Professor Countryman's name was mentioned this morning. Professor Countryman wrote the absolute article on executory contracts. There are two articles which appear in the Minnesota Law Review. I think it was 1973 and 1974. The second article deals with collective-bargaining agreements, and there is a section in that article in which he talks about the ability, as you have described it, of abrogating a contract upon the filing of a petition. And he talks about the Penn Central case.

If you may recall, Mr. Chairman, the Penn Central is subject to the Railway Labor Act, and there was a question of modifying the working rules, and so on. Under the RLA, you cannot do that unless you go through the processes of the RLA for a railroad.

Unless Congress passed emergency legislation, the Penn Central was going to close down, and Congress, on midnight before the day the strike was supposed to begin, did pass emergency legislation and the problem was dissolved.

But Professor Countryman notes in that article that if you had to enforce the provisions of the RLA with respect to an airline, no airline could survive that and still reorganize. The operation may be successful but the patient will die, because you need that immediate relief. I think what the National Bankruptcy Conference has suggested, which goes beyond what I would suggest, is that the debtor in possession or the trustee have the right to go to court on an expedited basis, similar to a TRO or whatever, and ask the court for immediate relief from a contract so that it can operate its business.

In the case of Continental, for many months, Continental was losing money. It had a negative cash flow. How could it have possibly lived up to that contract and operated? Are no jobs better than 8,000 jobs? I think that is what the issue gets down to.

Mr. Onstad. I also would like to add, Mr. Chairman, we have attached to our testimony a proposal, based on our own experience, where we believe if we could have had a quick hearing and a quick decision within the 7- to 14-day timeframe that Mr. Rodino talks about, we may not have had a strike. There would have been certainty among our employees, certainty among everybody involved. We think that is in the public interest.

The feature where we perhaps differ a little bit with Mr. Thompson this morning is only this. We would say that if you picked a 14-day timeframe, then the union contract stays in place for that 14-day timeframe, and the company has the burden of proof to make sure, by a preponderance of the evidence, that the contract should be rejected. But at the end of that 14-day timeframe, either the court has ruled or the contract lapses; you can unilaterally reject it. In other words, there is a period of time to rationalize the interests here, for you to get into court and make your showing, and the court to have ruled, and at the same time you are protecting the union interest. We would ask you to take that proposal into account as well when you are considering it.

Mr. Miller. That is very similar, Mr. Chairman, to bankruptcy rule 4001, which went through the Congress and is now effective, on the automatic stay. If the court does not render a decision within 30 days of the commencement of the final hearing, the automatic stay expires.

The Chairman. You have given very good testimony here today. I hope we can resolve the problem. I do not have a lot of optimism, based upon what I have heard here today. It may be that some of us just have to grab the ball and do the best we can. We may need to talk to some of our counterparts in the House as well and see what really can be done. What I do not want to do is to get in a situation where we really cannot resolve this problem. Yet, like I say, I am not very optimistic, listening to the parties and having gone through the negotiations that we have held.

I have to admit, the compromise we have fashioned leans rather heavily toward unionized labor, as you know, and everybody on the part of organized labor admitted it. Yet, one of the real reasons it was shot down was because of organized labor. I am not trying to lay blame; I am just saying, they felt it was not far enough because it was not the same as the House.

Mr. **Miller**. You went through a typical labor negotiation.

The **Chairman**. I have been through them before, so I understand. At least there are some economies that sometimes forced people to do what they really have to do in their best interest. In this situation, there may not be, other than the best interest of the country.

Now, on the other side, we have the chamber saying that they do not want any change from the present Bildisco. Unless the unions completely back off and let the bankruptcy bill go through, that means let the House vote the bankruptcy bill up without *Bildisco* modification, there is not going to be any agreement. So we are going to see what we can do to bring them together, but I do not know how well that can be done.

In the meantime, you probably are not in the worst of shape if nothing happens here, except over the long run you are going to be very upset because the country will not have this bankruptcy bill. That will affect you in many ways, directly and indirectly, and every other business in this country and every other union in this country. I guess I can personally live with anything. But when I look at all the work that we put into get a bankruptcy bill that will benefit this country and everybody on all sides of the issues in this country, and how difficult that was to do, and then it is fouled up because of this one issue, it really has me in a quandary. I feel this issue is important, but I also feel the bill is more important than this particular issue.

I wish we could resolve it on some other bill, but unfortunately it is going to have to be resolved on this one, it looks like to me. In the meantime, any ideas you have that will help us to resolve it, I will be happen to listen to them and my staff will be happy to listen to them. We will try to bring together Democrats and Republicans, union and nonunion, management and employee groups and see what we can do to get them altogether. We only have a few weeks to do it, and I really seriously question whether we will extend the time one more time. At least 10 days of those few weeks happen to be recess days. I, myself, am going to be gone from Washington for much of those 10 days back to my home State.

We will just see what can be done. Anything you can do to assist or help, we would love to hear from you. We have had some excellent testimony from all people here today. I just want to say, I respect everybody who has testified.

Last but not least, I do think that Senator Biden was right in criticizing me for holding the hearing during the memorial service, except that I did not personally have one Senator ask me not to do it because I felt they all knew how important this was. This was the only day I have had, and here it is 5:15. Frankly, if I had asked all the questions I wanted to ask, it would be 10:15. To that extent, I apologize. I feel very badly. Some of them feel that we should not have proceeded, but I can guarantee you that had we not, I do not think we would have been through in any way, shape, or form today, and I just do not have the time tomorrow.

I wanted to accommodate all of you, and I think there is a need to accommodate witnesses who come in from all over the country. I just hope that you appreciate it. I am taking a few lumps from a couple of my colleagues, and rightly so.

[Additional material supplied for the record follows:]

UNITED STATES
BUSINESS AND INDUSTRIAL COUNCIL
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BAKER ARMSTRONG SMITH
VICE PRESIDENT FOR GOVERNMENT AFFAIRS
GREGORY N JONSSON
BOARD OF DIRECTORS*
CHAIRMAN
F W STEVENSON
VICE CHAIRMAN
HARRIS SAUNDERS, JR

April 11, 1984

Mr. James Stevens
Majority Council
Committee on Labor and Human Resources
U.S. Senate
Washington, D.C. 20510

Dear Mr. Stevens:

On behalf of the U.S. Business and Industrial Council, I would like to submit the enclosed prepared statement of Mr. Baker Armstrong Smith, our executive vice president, for inclusion in the record of the Joint Hearings of the Committee on Labor and Human Resources and Committee on Judiciary on Tuesday, April 10, 1984.

The U.S. Business and Industrial Council is a fifty-one year old business association of several thousand senior corporate executives nationwide. The Council's members are very interested in having their views with regard to any labor provisions in the revised bankruptcy code recorded for the record.

Prior to joining the USBIC, Mr. Baker Smith served as Assistant to the Secretary of Housing and Urban Development for labor.

If there are any questions regarding our request of the enclosed statement, please contact me at 296-0947.

Th[illegible]k you in advance for your cooperation.

Sincerely,

John P. Cregan

John P. Cregan
Washington Representative

JPC:nhv

FIGHTING FOR FREE ENTERPRISE ..... SINCE 1933

STATEMENT OF

BAKER ARMSTRONG SMITH
EXECUTIVE VICE PRESIDENT,
UNITED STATES BUSINESS AND INDUSTRIAL COUNCIL

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
AND
COMMITTEE ON JUDICIARY

UNITED STATES SENATE

APRIL 10, 1984

Chairman Hatch, Chairman Thurmond, and Members of these Committees: My name is Baker Armstrong Smith. I am executive vice president of the United States Business and Industrial Council (USBIC). USBIC is a fifty-one year old business organization of several thousand senior corporate executives nationwide.

The members of the United States Business and Industrial Council represent a wide range of businesses and industries - large-sized, medium-sized and small-sized. USBIC members share a principled commitment to defend and advance our political and economic traditions.

I appreciate the opportunity to share with you the USBIC's views on a subject so very important to American business. We are grateful to have this forum which will allow the respective parties assembled to present their thoughts on the status of collective bargaining agreements within the framework of our bankruptcy code.

This is certainly a fundamental and most profound subject, and one that merits close attention and careful scrutiny. The proponents of H.R. 5174 have attempted to compartmentalize the employer-employee relationship as one amoung many of the factors that determine the financial status of a business when, in fact, it is the paramount obligation of any business.

Mr. Chairman, the proponents of H.R. 5174 have stated that the aim of this provision is the preservation of the worker's job. However laudable their statements appear, incorporation of this provision into the bankruptcy code would insure that in most cases the opposite would most likely be true. By mandating that a potentially burdensome collective bargaining agreement be preserved, H.R. 5174 would only precipitate the liquidation of many troubled businesses thereby resulting in the permanent loss of both union and non-union jobs.

Furthermore, H.R. 5174 seriously undermines the central purpose of our nation's bankruptcy laws-the provision of an opportunity for financially troubled companies to reorganize their assets and liabilities in an effort to forestall liquidation.

The members of the United States Business and Industrial Council have followed closely the developments with respect to revision of the U.S. Bankruptcy Code. Our members are particularly interested in H.R. 5174, a bill passed in the United States House of Representatives amending Title II of the U.S. Bankruptcy Code. USBIC viewed the passage of this amendment as a legislative disaster for the business community.

H.R. 5174 greatly restricts the setting aside of collective bargaining agreements by financially troubled employers filing for reorganization under Chapter II of the bankruptcy code. The effect would be to reverse a recent unanimous Supreme Court decision, National Labor Relations Board v. Bildisco and Bildisco, holding that bankruptcy courts can permit a debtor-in-possession to reject a collective bargaining agreement. The test for when the bankruptcy court can permit abrogation of the union contract is a showing that the contract "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."

The Supreme Court's holding is specific, timely and unanimous. By its decision, the Court has clearly accorded special treatment to union contracts to safeguard the interests of union workers and to distinguish, in the reorganization process, labor contracts from contracts for goods and services.

The proponents of H.R. 5174 advance the arguement that the Supreme Court's Bildisco ruling seriously jeopordizes the concept of our collective bargaining process. This is a completely unproven and patently untrue contention.

There are already in place other clearly defined safeguards to prevent the misuse of the reorganization process. Employers continue to be subject to the ongoing equitable review and legal and procedural constraints of the bankruptcy court prior to final approval and adoption of the reorganization plan.

Therefore Mr. Chairman, the United States Business and Industrial Council views H.R. 5174 as a completely unnecessary provision that would impose a burden on many financially troubled employers precluding their opportunity for rehabilitaion.

Members of these Committees, the USBIC written Declaration of Policy states that the public interest requires that organized labor unions be restrained from taking actions which would unreasonably restrain trade and commerce. Should H.R. 5174 be incorporated into the U.S. Bankrupcy Code, it would impose an unfair situation to the wide spectrum of creditors of a financially troubled employer either by precipitating company liquidation or by requiring disproportionate sacrifices the creditors.

The USBIC policy declaration further states that the rights of individual workers and the general welfare of the people ought not to take precedence over the special privelages enjoyed by organized labor unions. Recognizing that more than 80 percent of the American workforce is not unionized, enactment of H.R. 5174 or similar legislation would force financially troubled employers to extract wage and benefit concessions and deferrals from their non union employees exclusively. Furthermore, layoffs would be confined to non union employees if the relevant collective bargaining agreement has layoff provisions. Thus, legislation such as H.R. 5174 discriminates against non union workers.

On behalf of the members of the United States Business and Industrial Council, I respectfully urge the Members of these Committees to oppose H.R. 5174 or similar legislative proposals as highly objectionable and injurious labor provisions. The members of the USBIC view these hearings today as vitally necessary and appropriate. Legislative reversal of a unanimous Supreme Court decision without the thoughtful consideration of concerned parties would be a serious compromise of our democratic process.

The USBIC appreciates the opportunity of submitting this statement.

**AMERICAN
TRUCKING
ASSOCIATIONS, INC.**
1616 P Street, N.W., Washington, D. C. 20036

PRESIDENT
Bennett C. Whitlock, Jr.
(202) 797-5212

April 11, 1984

The Honorable Strom Thurmond
Chairman, Judiciary Committee
U.S. Senate
Washington, D.C. 20510

The Honorable Orrin G. Hatch
Chairman, Labor and Human Resources
U.S. Senate
Washington, D.C. 20510

Dear Chairmen:

As the national trade association for the trucking industry, American Trucking Associations, Inc. (ATA) welcomes this opportunity to present its views on the legislative proposals to reverse the Supreme Court's February 22 decision in National Labor Relations Board v. Bildisco and Bildisco. That decision allows the bankruptcy courts to approve a company's decision to reject its collective bargaining agreement under appropriate circumstances and provides a much needed and reasonable avenue for corporate rehabilitation. Therefore, ATA urges you to reject efforts to dilute the Bildisco decision.

The trucking industry over the last several years has experienced the debilitating interaction of deregulatory pressures (both administrative and legislative) with the effect of the recent economic recession. While the industry is improving somewhat from the economic recovery, the regulatory changes and and restructuring of the industry are continuing. This has resulted in an inordinate number of bankruptcies in the industry. The trucking industry's bankruptcy rate is double the rate for all industries generally. Since 1980, over 350 regulated motor carriers, which held a substantial presence in the industry at

A National Federation Having an Affiliated Association in Each State

that time, have either severely reduced operations or gone out of business. In the aggregate, these companies had received more than 3.5 billion dollars in annual revenues and employed almost 70,000 workers.

The trucking industry had been tightly controlled by the Interstate Commerce Commission (ICC) since 1935. Entry to the industry was limited, companies were restricted to particular routes and geographical areas, and pricing variations were circumscribed. Competition in this controlled environment was based on service more than price.

Beginning with the administrative changes in 1977 and continuing today as the ICC goes far beyond the provisions of the 1980 Motor Carrier Act, the regulatory framework is being radically altered. The loosening of entry requirements has led to a flood of new entrants into the industry almost doubling the number of for-hire motor carriers. New pricing flexibilities spurred by the excess capacity from virtually open entry and declining tonnage has generated vigorous price competition among new and old carriers.

The effect of the changes taking place in the trucking industry has been severe on union carriers. Almost all of the new entrants are non-union companies with substantially lower labor costs. In 1980, non-union carriers with revenues of more than $1 million had wage rates 25 percent below similar-sized union carriers. Today, the disparity is even greater. It was inevitable that union carriers with higher costs would be pushed out of the market.

For these reasons, the trucking industry requires fair and reasonable opportunities for failing motor carriers to reorganize and rehabilitate themselves in the changing environment. The Bildisco decision provides such an opportunity and should not be reversed.

Until Bildisco, the bankruptcy courts had little guidance enabling them to pass judgement on a company's plan for reorganization when a collective bargaining agreement was in question. The U.S. Supreme Court, in its unaminous decision in Bildisco, has given that guidance. It found labor contracts to be "executory contracts" under the Bankruptcy Code, which may be set aside in a chapter 11 reorganization proceeding -- if the bankruptcy court concludes "after careful scrutiny" that "the equities balance in favor of rejecting the labor contract." The balancing equities standard requires the court to "consider the interests of the affected parties...the debtor, creditors, and employees...the likelihood of and consequences of rejection, ...and the impact of rejection on the employees," among other factors.

The trucking industry believes a common sense balance has been struck between the labor laws and the bankruptcy laws which will help to insure the success of reorganization efforts. A successful reorganization redounds to the benefit of all -- the creditors, the employees and the company. In transportation, the public is best served with a stable motor carrier industry. The shippers of this country are entitled to as stable and viable motor carrier units as possible and we believe successful reorganization can add to that stability.

The trucking industry is concerned with the present efforts underway to dilute the *Bildisco* decision. The present rush to do so in the short timeframe available should be avoided. The proper balance to be struck between the labor laws and the bankruptcy laws can be argued forever. The Supreme Court has given its interpretation and the opportunity should be given to see how that balance works. Any rebalancing should come only after abuses are demonstrated. Contrary to the testimony of the Teamsters' Union yesterday, we are aware of no motor carrier that has gone into reorganization with the sole purpose of rejecting a labor contract. The costs attendant reorganization preclude such a subterfuge. The "heavy-handed" threats to file for bankruptcy are empty threats and have no real world validity. The trucking industry believes there will be no abuses under the *Bildisco* standards and that the public will benefit from more successful reorganizations due to the Supreme Court's decision.

Finally, we request that this letter be made a part of the hearing record on H.R. 5174, Bankruptcy Amendments of 1984, April 10, 1984.

Very truly yours,

Bennett Whitlock

Bennett C. Whitlock, Jr.

cc: Members of the Senate Committees on the
Judiciary and Labor and Human Resources

NATIONAL TOOLING &
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April 4, 1984

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

Dear Senator Hatch:

It was nice speaking with you last week. As I had mentioned, NTMA, as well as many other associations in the small business community, is greatly concerned about aspects of the bankruptcy legislation currently under consideration in the United States Senate.

What concerns us is the possibility that the result of a House/Senate conference relating to aspects of the legislation dealing with the Supreme Court's Bildisco decision would do great harm to business interests. Even a modest compromise in Senate language relating to the "unilateral" aspect of the Court decision could end up being a big mistake if it ended up becoming the starting point of negotiations with House conferees.

We believe that the Court's decision was a good one. Union interests are already well protected under current law. We understand that there will be a joint hearing of the Senate Judiciary Committee and the Labor and Human Resources Committee to review this issue on Tuesday, April 10. We believe the small business community should be offered the chance to express its views.

I have already discussed this issue with officers of the Small Business Legislative Council, a coalition of 80 small business trade associations. A representative of SBLC, either ourselves or another representative to be designated by our Executive Committee, would like to present testimony at the April 10 hearing. I mentioned this yesterday to Randy Rader of your Judiciary Subcommittee. We know that there are many interested in testifying, so please let us know.

Cordially,

Bruce

Bruce N. Hahn
Manager of Government Affairs
and Public Relations

BNH:rgj
cc: Herbert Liebenson, President
National Small Business Association

Jared Blum, President
Small Business Legislative Council

Michael Roush
National Federation of Independent Business

✓ Randal R. Rader, General Counsel
Senate Judiciary Subcommittee on the Constitution

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HOWARD E. O'LEARY

April 13, 1984

The Honorable Orrin Hatch
Chairman
Committee on Labor and Human
Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
226 Dirksen Senate Office Building
Washington, D.C. 20510

Re: April 10, 1984 Joint Hearing On Rejection of Collective Bargaining Agreements in Bankruptcy Reorganization

Dear Senators Hatch and Thurmond:

This firm represents Central Transport, Inc. ("Central"), a general commodity motor common carrier based in Sterling Heights, Michigan, and its affiliates: The Mason & Dixon Lines, Inc. ("Mason Dixon"), based in Kingsport, Tennessee, and Tucker Freight Lines, Inc. ("Tucker"), based in South Bend, Indiana.

On Tuesday, April 10, 1984, Jackie Presser, General President of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America made certain allegations against Mason Dixon and Tucker during the Committees' Joint Hearing on Rejection of Collective Bargaining Agreements in Bankruptcy Reorganization.

Enclosed are ten (10) copies of a statement by James D. Payne, Central's Senior Vice President, which responds to Mr. Pressler's allegations and also offers Central's comments on legislative proposals to reverse the U.S. Supreme Court

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decision in National Labor Relations Board v. Bildisco & Bildisco, ____ U.S. ____, 79 L.Ed.2d 482, 104 S. Ct. ___ (1984).

Central requests that a copy of Mr. Payne's statement be made a part of the Committees' hearing record and printed in full.

We have taken the liberty of distributing copies of Mr. Payne's statement to the other members of the Senate Labor and Judiciary Committees.

If you or members of the Committees' staffs have questions on this matter, please feel free to contact Mr. Payne at (313)939-7000 or the undersigned.

Very truly yours,

Howard E. O'Leary

Howard E. O'Leary

HEO:bwt
Enclosures

STATEMENT

OF

JAMES D. PAYNE

SENIOR VICE PRESIDENT,

CENTRAL TRANSPORT, INC.

STERLING HEIGHTS, MICHIGAN

BEFORE THE COMMITTEE

ON LABOR AND HUMAN RESOURCES AND

THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

April 13, 1984

My name is James D. Payne and I am Senior Vice President of Central Transport, Inc. ("Central"), a Michigan corporation with its principal offices located at Sterling Heights, Michigan, near Detroit.

Central is a general commodity motor common carrier operating primarily in Michigan, Indiana, Ohio, Illinois, Kentucky, Wisconsin, Minnesota, New York, Pennsylvania and West Virginia. An affiliate, McKinlay Transport Limited ("McKinlay"), is based and operates primarily in the province of Ontario, Canada. McKinlay also serves border points in the United States at Buffalo and Niagara Falls, New York; Detroit, Port Huron and Sault Ste. Marie, Michigan.

My duties include the handling of various traffic and regulatory functions and I am authorized to present this statement on behalf of Central and its affiliates.

Central wishes to respond to certain allegations made against its affiliates, The Mason & Dixon Lines, Inc. ("Mason Dixon")[*/] and Tucker Freight Lines, Inc. ("Tucker") by Jackie Presser, General President of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

---

[*/] The acquisition of Mason Dixon is subject to the approval of certain regulatory authorities and has not yet been consummated.

during the April 10, 1984 Joint Hearing held by the Senate Labor and Judiciary Committees on Rejection of Collective Bargaining Agreements in Bankruptcy Reorganization and to express our views on legislative proposals to reverse the United States Supreme Court decision in National Labor Relations Board v. Bildisco & Bildisco, _____ U.S. _____, 79 L.Ed.2d 482, 104 S. Ct. _____ (1984).

The Bankruptcy Court's January 1984 Rejection Of Tucker's Collective Bargaining Agreement Occurred Prior To The Supreme Court's Decision In The Bildisco Case.

On Tuesday, Mr. Presser alleged that employers were threatening to file for bankruptcy in order to extract concessions from their employees:

> . . . In response to the serious financial problems caused by deregulation, many carriers have attempted to lower costs by pursuing exploitive labor policies. This phenomenon is becoming increasingly common. Heavy-handed threats to file for bankruptcy in order to coerce sacrifices from employees have become a stock weapon in management's arsenal against labor. . . . If corporate giants succeed in evading their bargaining obligations and destroying collective bargaining agreements, then their cynical strategy will become an accepted way of doing business in this country. Presser Statement, p. 3.

Pressed by Senators Nickles and Quayle to cite instances of such abuse, Mr. Presser indicated that both Tucker and Mason Dixon had engaged in such tactics. Moreover, the implication of Mr. Presser's remarks is that Tucker and Mason Dixon are among a number of companies which -- in the wake of the Supreme

Court's decision in the Bildisco case -- have filed for bankruptcy reorganization to terminate their collective bargaining agreements and avoid such obligations thereunder as making health, welfare and pension payments.

Central's acquisition of Tucker occurred in September 1983 -- some five months prior to the Supreme Court's February 22, 1984 decision in the Bildisco case. Tucker's petition for reorganization was filed in Bankruptcy Court in Grand Rapids, Michigan, on September 16, 1983. Prior to filing, Tucker, a motor carrier based in South Bend, Indiana which employs approximately 250 people, had lost money for five consecutive years.

At the time its petition for reorganization was filed in September 1983, Tucker's financial straits were dire indeed. The bankruptcy judge later found that Tucker's financial condition met the more strigent "last resort" test applied by the second circuit in Brotherhood of Railway and Airline Clerks v. REA Express, Inc., 523 F.2d 164 (2nd Cir.) cert. denied, 423 U.S. 1017 (1975).

During the fall of 1983, Tucker attempted to negotiate a solution to its problems with the International Union. After these efforts failed, Tucker filed a petition for rejection of its collective bargaining agreements. After the Bankruptcy Court's issuance of the order rejecting Tucker's collective bargaining agreement, Tucker implemented its last offer to the union. Since that time, the International Union has refused to negotiate.

On the eve of the Senate Labor and Judiciary committees' joint hearing, Tucker was struck.

Mason Dixon Made No Threat To File Bankruptcy In Order To Obtain Concessions From Its Employees And Has Continued To Make Payments To The Employees' Health, Welfare & Pension Fund.

In response to questioning by Sen. Nickles, Mr. Presser identified Mason Dixon as a company which had engaged in "heavy-handed" threats prior to filing for bankruptcy. Mr. Presser also implied that Mason Dixon had refused to make payments to the employees' health, welfare and pension fund since filing for bankruptcy.

Once again, the facts are otherwise.

Central entered into an agreement in principle to acquire Mason Dixon in December 1983, and was granted temporary control over Mason Dixon by the Interstate Commerce Commission in January 1984.

Prior to its acquisition by Central, Mason Dixon, based in Kingsport, Tennessee, was one of the oldest family-owned trucking businesses in the United States. Mason Dixon employs approximately 4800 people and operates terminals in North Carolina, South Carolina, Kentucky, Tennessee, Alabama, Georgia, Mississippi, Florida and other states. In our view, there can be little doubt that Mason Dixon was bankrupt -- under any test -- at the time of its bankruptcy filing. In 1982 and 1983, Mason Dixon lost approximately $12 million. In 1984, the company was losing anywhere from $250,000 to $350,000 per week. It did not have enough cash to meet its payroll.

On March 29, 1984, Mason Dixon filed for financial reorganization in Bankruptcy Court in Greensboro, North Carolina. On the following day, Mason Dixon sent a telegram to the International Union requesting that a committee be formed to negotiate a solution to the company's problems.

On April 3, 1984, Mason Dixon met with representatives of the International and the Teamster locals which have collective bargaining agreements with the company, and submitted a proposal to attempt to save the company. At the end of the meeting, the union representatives promised to respond to Mason Dixon's proposal by Wednesday, April 11, 1984. On April 9, 1984, Mason Dixon was struck.

In addition, contrary to the implication of Mr. Presser's testimony, there are no changes in effect in the National Master Freight Agreement between Mason Dixon and the union. Also, at the present time, no changes have been made in payments to the health, welfare and pension fund of union employees.

On April 10, 1984, Mason Dixon filed a verified complaint for injunctive relief and a request for a temporary restraining order in the Bankruptcy Court in Greensboro, North Carolina on grounds that the strike was illegal because it violated Article 8, Section 2 of the union's National Master Freight Agreement. The Court granted Mason Dixon's request for a temporary restraining order enjoining the strike on the same day, and scheduled a hearing on an order to show cause for April 19, 1984.

Central's Motive In Acquiring Tucker and Mason Dixon Is Not To Terminate Their Collective Bargaining Agreements, But To Return Those Companies To Profitability.

Since 1970, Central has acquired and attempted to rehabilitate a number of bankrupt motor carriers, including (1) McKinlay, based in Mississauga, Ontario (1970); (2) Michigan Express, based in Grand Rapids, Michigan (1970); (3) Superior Forwarding, based in St. Louis, Missouri (1982); (4) General Highway Express, based in Sidney, Ohio (1983); (5) Tucker, (1983); and (6) Mason Dixon, (1983). In each instance, Central's motive was to expand its operations profitably by acquiring additional operating authority, personnel, terminals, and goodwill. The International Brotherhood of Teamsters represented the employees of each of the six bankrupt motor carriers acquired. The rehabilitation of McKinlay, Michigan Express, Superior Forwarding, and General Highway Express has been successful and approximately 1600 jobs have been preserved without any rejection or abrogation of the collective bargaining agreements involved.

Unfortunately, the chances of rehabilitating Tucker and Mason Dixon and preserving the 5000 jobs involved have obviously been jeopardized by the April 9 strike.

CONCLUSION

Central believes that the provisions of H.R. 5174 relating to the rejection of collective bargaining agreements should be the subject of hearings in the House of Representatives and further hearings in the Senate.

In Central's view, the proponents of these provisions have failed to demonstrate a need exists for their enactment. Certainly, no credible evidence has yet been presented to support the claim that abuses of the present system have occurred.

Accordingly, Central submits that provisions relating to the rejection of collective bargaining agreements should be deleted from any bankruptcy court legislation considered by Congress this session.

Wilson Foods

Wilson Foods Corporation

Corporate Headquarters

4545 Lincoln Boulevard
Oklahoma City, Oklahoma 73105
Telephone 405/525 4545

April 19, 1984

The Honorable Don Nickles
U.S. Senate
SR-452 Russell Senate Office Building
Washington, D.C. 20510
Attn: Chuck Carroll

Dear Chuck:

Attached are some comments we would like to have filed as part of the record for the joint Judiciary Committee-Labor and Human Resources Committee hearing on bankruptcy-Bildisco which was held on April 10, 1984. I understand that the record of those hearings will remain open until tomorrow.

As you will see, the comments outline in some detail the events leading up to and following Wilson Foods' decision to file for reorganization under Chapter 11 of the Bankruptcy Code. They also explain why we believe a company should be able to reject a burdensome labor agreement at the time of Chapter 11 filing pending approval (or disapproval) by the Bankruptcy Court.

Thank very much for giving us this opportunity to comment on this important issue. Please don't hesitate to call with any questions.

Sincerely,

D. M. Thompson
Director, Public Affairs

rdr

WILSON FOODS: CHRONOLOGY OF EVENTS

I. INTRODUCTION

The seeds of Wilson's labor cost problem were planted in the 1940's when the federal government required that the United Food and Commercial Workers (UFCW or Union) and major companies, including Wilson, Armour and Swift, sign a master agreement with a standard base wage rate and uniform benefits for slaughtering and processing companies. Since 1957, the master agreement has included "cost of living" provisions, as a result of which the basic hourly wage rate rose during the rampant inflation of the 1970's from $4.71 in 1973 to $10.69 in 1982. While the master agreement wages and benefits were rapidly increasing, new employers were entering the industry, paying significantly lower wages and benefits.

The following detailed chronology of events is divided into two major sections: (1) the history of Wilson's "concessions" bargaining with the UFCW and the events leading to Wilson's decision to file under Chapter 11; and (2) the events following the filing of the reorganization and rejection petitions, including the Company's efforts to expedite, and the Union's efforts to delay, the rejection hearing before the bankruptcy court.

As the chronology indicates, Wilson was negotiating the terms of a successor collective bargaining agreement with the Union, while attempting unsuccessfully to expedite a hearing on its rejection petition. Unless a company in

Wilson's financial position is able to repudiate a burdensome labor contract *pending* approval (or disapproval) by the bankruptcy court, unions will have every incentive to delay a rejection hearing and forestall modifications of the labor agreement that could be essential to the company's survival.

II. HISTORY OF CONCESSIONS BARGAINING: 1981-1983

12/81	Wilson negotiates a wage freeze with the UFCW.
1982	Wilson becomes increasingly disturbed that the Union is weakening its competitive position in the industry by granting concessions to its competitors and failing to organize new entrants. Donald D. Davis, Wilson's Vice President of Operations & Human Resources, periodically complains to Lewie Anderson, a Vice President of the UFCW and the Director of the Packinghouse Division, that the concessions the UFCW is granting Wilson's competitors are seriously eroding Wilson's ability to compete.
Fall 1982	Analysis by outside consultant confirms Wilson's poor competitive position in the industry.

12/2/82	Meeting between Davis and Anderson concerning Wilson's inability to compete in the industry. Davis provides Anderson a list of approximately 15 contracts settled since the December 1981 wage freeze that reflect wage and benefit rollbacks and substantially lower wage rates for Wilson's competitors. Anderson acknowledges that the concessions injured Wilson and pledges assistance.
12/7/82	Davis and Kenneth Griggy, the President and Chief Executive Officer of Wilson meet, at the Company's request, with Carl Nothnagel, the President of UFCW, Local 576, in Marshall, Missouri, concerning renegotiation of their collective bargaining agreement, which was scheduled to expire in early February, 1983. (The Marshall plant was not covered by the master agreement, which did not expire until September 1985). Griggy and Davis point out, and Nothnagel acknowledges,

acknowledges, that Wilson was experiencing substantial financial problems in an industry increasingly dominated by lower labor cost competitors.

1/3/83 Griggy and Wynn meet in Washington, D.C. to review Wilson's financial status and the profit picture for the 1982 fiscal year. Griggy discusses the impact of new low cost producers in the industry and states that Wilson cannot compete with its current labor costs. Griggy asks for a substantial reduction in wages and benefits, but indicates willingness to offer a substantial profit-sharing plan to the affected hourly employees.

Wynn acknowledges that Wilson is at a competitive disadvantage and that the UFCW is the source of its difficulties.

	Wynn requests two weeks to consider and respond to the Company's profit-sharing proposal, but does not thereafter contact Griggy.
January 1983	Marshall contract negotiations delayed by Nothnagel to give Wynn an opportunity to act.
2/2/83	Company and Union meet to review points discussed at January 3 Griggy-Wynn meeting. Wynn states that he understands the problem but does not have a solution and requests two or three additional weeks to consider the Company's profit-sharing proposal. Again, Wynn fails to respond.
2/21/83	At a company-initiated meeting, Davis again emphasizes to Anderson Wilson's dire financial straits. Anderson acknowledges the problem, but states that he needs time.

March 1983	Griggy commissions survey of wages and benefits in the pork industry. Survey confirms two tiers: a low-cost tier, with wage rates at or below $8.00 per hour and a high-cost tier at $10.69.
3/30/83	Meeting with Griggy, Davis and Anderson in Chicago. Griggy reviews with Anderson the industry conditions and advises that Wilson is losing $1 million a week. Griggy also states that Wilson was at a cross road and was considering several options. Anderson replies that he understands the problem, but the local union leadership is divided and needs to be educated. Griggy states that to be competitive, Wilson would require a $4.50 wage or benefit reduction, which Anderson rejects.
Mid-April 1983	Company-wide operating losses of approximately $1 million a week. Mounting losses jeopardize Wilson's $60 million credit line. Wilson in

	imminent risk of breaching covenants in its loan agreement requiring it to maintain a net worth of $67 million.

III. COMPANY FILES REORGANIZATION PETITION AND SEEKS TO EXPEDITE COURT APPROVAL OF REJECTION OF COLLECTIVE BARGAINING AGREEMENTS

4/22/83	Company files petition to reorganize under Chapter 11 and to reject collective bargaining agreements.
4/25/83	Company offers its former employees modified terms and conditions of employment. The employees accept employment under the modified conditions.
Late April-May 1983	UFCW and several locals file unfair labor practice charges with the NLRB alleging generally that the Company's unilateral repudiation of its collective bargaining agreements violated its duty to bargain.
5/2/83	Union engages in a concerted slow-down.

5/3/83	Union and Company meet; Wilson outlines the sequence of events leading to the April 22 filing and the various alternatives to filing. Company also discusses the current financial picture and the Union requests financial data, which the Company agrees to supply.
5/6/83	Company moves for a temporary restraining order enjoining the NLRB proceedings on the ground that the issues raised by the Union's charges are within the exclusive jurisdiction of the bankruptcy court. Court denies motion and schedules a hearing for June 9 on a request for a preliminary injunction.
5/10/83	Union engages in incidents of sabotage, including damage to animal carcasses.
5/14/83	At Wilson's initiative, negotiations with the Union on a successor agreement resume. Wilson agrees to reinstate without prejudice many provisions of

	the rejected contract provided that normal production resumes and continues during negotiations.
6/2/83	Wilson requests bankruptcy court to expedite hearing on its complaint to reject its collective bargaining agreements.
6/3/83	Union strikes several Wilson plants.
6/14/83	Bankruptcy court denies Wilson's request for a preliminary injunction against the NRLB.
6/23/83	UFCW and Wilson reach agreement on plants covered by master agreement; local UFCW unions covering Marshall, Missouri (Local 576) and Louisville, Kentucky plants (Local 227), together with a Teamsters Local at Logansport, Indiana, do not settle.
7/14/83	Bankruptcy court orders rejection hearing on August 30, with discovery cutoff of August 22.

8/12/83	Union seeks continuance of rejection hearing from August 30 to October 1983. Court orders a continuance from August 30 to September 6, with a discovery cutoff of August 29.
8/17/83	Labor Creditors Committee seeks continuance of rejection hearing to December 1, with a discovery cutoff of November 15.
8/19/83	Wilson files strenuous objection to continuance on the basis of harm to the estate.
8/22/83	Court orders continuance from September 6 to November 21, with discovery cutoff of November 7.
9/9/83	Wilson moves to consolidate the three remaining unfair labor practice proceedings before the NLRB.
10/6/83	NLRB orders consolidation and schedules consolidated hearing on October 31.

11/2/83	NLRB's Administrative Law Judge approves settlement between Wilson and UFCW Local 576.
11/21/83	Unfair labor practice hearing involving UFCW Local 227 and Teamsters Local 543 resumes.
11/22/83	Settlement reached with UFCW, Local 227.

In December 1983, Wilson reached an agreement with the Teamsters, Local 543. As part of the three settlements, Wilson and the unions agree that the rejection complaints before the bankruptcy court would be similarly settled.

BEFORE THE

SENATE JUDICIARY COMMITTEE

AND

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

POSITION STATEMENT
OF
WILSON FOODS CORPORATION
ON
PROPOSED LABOR AMENDMENTS TO THE BANKRUPTCY CODE

Respectfully submitted

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April 23, 1984

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BEFORE THE

SENATE JUDICIARY COMMITTEE

AND

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

POSITION STATEMENT
OF
WILSON FOODS CORPORATION
ON
PROPOSED LABOR AMENDMENTS TO THE BANKRUPTCY CODE

I. INTRODUCTION

Wilson Foods Corporation has previously submitted a chronology of the events leading to, and following, its filing of reorganization and rejection petitions under Chapter 11 of the Bankruptcy Code. A copy of the prior submission is attached hereto for convenience.

For reasons discussed below, Wilson Foods is strongly opposed to the labor provisions of H.R. 5174, or similar legislation, that would effectively reverse NLRB v. Bildisco & Bildisco (Bildisco),[1] in which the Supreme Court adopted a "balancing of the equities" standard for rejection of collective bargaining agreements and authorized the debtor's unilateral rejection of its labor contracts in the interim between filing a Chapter 11 petition and approval of rejection by the bankruptcy court. Wilson maintains in brief that Bildisco strikes the appropriate balance between the competing labor and bankruptcy interests and that H.R. 5174 undercuts the policies of the Bankruptcy Code without significantly advancing the competing goals of the National Labor Relations Act (NLRA). We contend, accordingly, that the Senate should vigorously resist attempts to alter Bildisco. In the following sections, Wilson will first discuss the Bildisco decision and then analyze the provisions of H.R. 5174, drawing from its recent experience under Chapter 11 to illustrate the deleterious consequences flowing from adoption of the proposed legislation.

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[1] 52 U.S.L.W. 4269 (February 22, 1984).

II. BILDISCO'S "BALANCING OF THE EQUITIES" STANDARD PROPERLY ACCOMMODATES THE COMPETING BANKRUPTCY AND LABOR INTERESTS

In Bildisco, the Supreme Court addressed two principal questions: (1) under what conditions can a bankruptcy court permit rejection of a collective bargaining agreement by the debtor in possession? and (2) does the debtor commit an unfair labor practice by unilaterally terminating or modifying a collective bargaining agreement prior to approval of the bankruptcy court? As to (1), the Supreme Court rejected the traditional "business judgment" standard applied by the courts to authorize rejection of ordinary commercial agreements under section 365(a)2/ and instead embraced a more stringent standard requiring the debtor to show that the collective bargaining agreement burdens the estate and "equity" favors rejecting the labor contract. The "balancing of the equities" approach represents a compromise between the more relaxed standard governing ordinary executory contracts and the very strict standard adopted by the Second Circuit in Brotherhood of Railway and Airline Clerks v. REA Express, Inc. 3/ that "unless the agreement is rejected, the . . . [debtor] will collapse and the employees will no longer have their jobs."

The Supreme Court concluded that rejection should be permitted only if essential to the successful rehabilitation of the debtor. In reaching an appropriate determination, a

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2/ Section 365(a) provides:

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section [not relevant herein], the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

The Supreme Court confirmed that the reference in section 365(a) to "executory contract" includes collective bargaining agreements.

3/ 523 F.2d 164, 172 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

bankruptcy court would be required to balance the interests of the affected parties, including the debtor, creditor and employees, and to weigh the impact of rejection on employees against the impact of affirmance on creditors generally. However, before balancing the interests, the bankruptcy court must first satisfy itself that the debtor has undertaken reasonable efforts to negotiate a voluntary modification of the labor contract and that negotiations are not likely to produce a prompt and satisfactory solution.

The standard unanimously adopted by the Supreme Court fully accommodates the policies of the NLRA while permitting debtors a reasonable opportunity to achieve a successful reorganization. Thus, the Court emphasized that the NLRA requires the parties to attempt to reach an agreement on terms and conditions of employment and that the bankruptcy court may intervene only if the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization. In addition, the Court, while rejecting the REA Express standard, indicated that the likelihood that the debtor would be forced into liquidation absent rejection of the labor contract, is a factor the bankruptcy court should consider in determining whether rejection is appropriate.

Perhaps equally significant, the standard adopted by the Supreme Court was generally consistent with the then prevailing law. The factors cited by pre-Bildisco courts in support of a decision to authorize repudiation of the collective bargaining agreement, including the debtor's good faith attempts to obtain concessions from the union and the absence of evidence that the debtor's request was motivated by a desire to rid itself of the union, remain relevant in the wake of Bildisco.4/ In addition, two of three circuit courts of appeals,5/ and a majority of the federal district courts, had adopted or applied a "balancing of the equities" test of rejection. The major aberration was the Second Circuit, which itself had accepted the "balancing of the equities" standard only a few weeks before REA Express was decided. Shopman's Local 455 v. Kevin Steel Prods., 519 F.2d 698, 707 (2d Cir. 1975) (authorizing rejection upon a determination that (1) the collective bargaining agreement is onerous and (2) the equities tilt in favor of the debtor in possession). The REA Express Court departed from Kevin Steel without explanation.

In codifying the REA Express standard, the proposed legislation reverses Bildisco, and a generally consistent line

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4/ See, e.g., In re Southern Electronics Co., 23 B.R. 348 (E.D. Tenn. 1982); In re Overseas National Airways, Inc., 238 F. Supp. 359 (E.D.N.Y. 1965); In re Allenwood Steel, 449 F. Supp. 165 (E.D. Pa. 1978).

5/ In re Bildisco, 682 F.2d 72 (3d Cir. 1982); In re Brada Miller Freight System, Inc., 702 F.2d 929 (11th Cir. 1983).

of pre-Bildisco judicial decisions, without a shred of evidence that Bildisco's compromise standard encourages employers to invoke the bankruptcy laws to abrogate their labor agreements. As Wilson's experience confirms, financially distressed employers will not casually seize upon Chapter 11 reorganization for the purpose of cancelling their collective bargaining agreements. Wilson considered every plausible alternative to Chapter 11, including the closing of unprofitable plants. However, Wilson's collective bargaining agreement contained a very onerous severance provision that would have been triggered by plant closings and that the Union was unwilling to modify.

In addition, Wilson attempted in good faith to negotiate wage and benefit concessions to avert a bankruptcy filing. In exchange for a reduction in wages and benefits, Wilson offered affected hourly employees a substantial profit-sharing plan -- an offer that the UFCW itself acknowledged is rarely forthcoming from employers seeking concessions. For its part, the UFCW did not question the severity of Wilson's cash drain and acknowledged that its failure to organize Wilson's lower labor cost competitors -- and its granting concessions to Wilson's competitors -- contributed substantially to Wilson's financial condition. Nonetheless, the Union did nothing more than pay lip service to modifying the labor agreements. If the REA Express standard were enacted into law, unions would have even less incentive to voluntarily negotiate modifications of an onerous labor agreement.

In any event, legislative adoption of REA Express would interfere with the reorganization process by imposing on debtors the nearly insurmountable evidentiary burden of proving that absent rejection, the jobs covered by the agreement "will" be lost and reorganization "will" fail. Moreover, by effectively immunizing collective bargaining agreements, H.R. 5174 discriminates against nonunion employees. Employers would be required to extract wage and benefit concessions from their nonunion employees and, in the event that the collective bargaining agreement contains job security provisions, to restrict layoffs to nonunion employees. In short, nonunion employees would bear the brunt of the cost-cutting even though the debtor's financial distress might be largely attributable to the collective bargaining agreement. Bildisco's "balancing of the equities" test, in contrast, spreads the burden more equitably because an employer who fails to extract similar sacrifices from nonunion employees could not expect under current law to obtain bankruptcy court approval of a rejection request.6/

6/ See, e.g., In Re Blue Ribbon Transportation Co., Inc., 113 LRRM 3505 (D.R.I. 1983). For its part, Wilson cut the salaries of management and nonunion employees in an effort to spread the burden.

III. UNILATERAL ABROGATION OF LABOR CONTRACT

Equally critical to the debtor's ability to successfully reorganize is the right to reject collective bargaining agreements unilaterally pending approval by the bankruptcy court. In Bildisco, the Supreme Court recognized that a debtor's inability to unilaterally modify the labor contract could force the debtor into liquidation, with an attendant loss of jobs. If the NLRB were free to conclude that unilateral modification pending the outcome of bankruptcy proceedings violated section 8(a)(5) and section 8(d) of the NLRA, the debtor would be deprived of the necessary "flexibility and breathing space" contemplated by the bankruptcy laws.7/

Wilson's experience confirms the importance of the ability to reject collective bargaining agreements unilaterally. After attempting to negotiate concessions with

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7/ The dissenting Justices in Bildisco argued that the employer's ability to modify labor contracts unilaterally may lead to labor strife and thereby decrease the prospects for a successful reorganization. As Wilson's experience indicates, strikes in the wake of a Chapter 11 filing may simply be a response to the employer's proposal for new terms and conditions of employment, rather than the unilateral abrogation of the prior contract. Thus, Wilson unilaterally rejected its labor agreements on April 22, 1983 and was struck several weeks later during the course of negotiations for a new collective bargaining agreement. The strike was quickly settled and did not have a perceptible impact on Wilson's reorganization. In any event, the risk that unilateral rejection poses to successful reorganization is far outweighed by the impact on debtors of an inability to act unilaterally.

the Union over a period of several months, Wilson reached a point in late March or early April 1983, when mounting losses of approximately $1 million a week jeopardized the $60 million line of credit essential to its continued operations.8/ The cash drain in early April was so rapid that the Company was in imminent breach of the $67 million net worth covenant in its loan agreement. Indeed, Continental Illinois National Bank and Trust Co. of Chicago, Wilson's principal bank, was requesting meetings with Company officials in early April concerning its reported financial difficulties.

If H.R. 5174, or similar legislation, had been in effect last year, Wilson may well have been unable to persuade banks to extend credit to a company saddled with extraordinarily costly labor agreements. In addition, Wilson would have been unable to defer until the very last moment a decision to file because the delay built into the proposed law would probably have resulted in Wilson's breach of its net worth covenant and a cutoff of essential credit. H.R. 5174 may well have the unexpected consequence of causing "premature" filings by ailing companies unable to act unilaterally and concerned about legally-sanctioned delays. Finally, the ailing company is unlikely to obtain voluntary wage and benefit concessions

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8/ Credit is essential in the livestock business because federal law requires payment for hogs and cattle by the close of business the day after slaughter.

from a union whose interest is to delay the rejection process and force the debtor to extract sacrifices from nonunion employees and creditors.

Nor would the bill's requirement of an expedited hearing have assisted Wilson. While H.R. 5174 requires a hearing within 14 days of the filing of a motion to reject, the bankruptcy court may continue the hearing "for cause". In addition, although the hearing must be completed no later than 14 days after its commencement, the bill again allows the court to extend the hearing "for cause".9/ Perhaps more significant, nothing in the proposed legislation requires a prompt ruling on the motion. In view of the typically voluminous evidence and complex issues in rejection hearings, a court that was diligently attempting to discharge its responsibilities could not reasonably be expected to rule very promptly. By locking the employer into the collective bargaining agreement until the bankruptcy judge has ruled, H.R. 5174 may encourage judges to dispose of rejection motions hastily and, indeed, to err in favor of rejection, without carefully sifting the evidence, in order to relieve the pressure on the employer.

9/ In granting continuances of Wilson's rejection hearing, the bankruptcy court cited the complexity of the issues and the volume of discovery -- factors that, if H.R. 5174 were enacted in its present form, could still persuade a court to continue rejection hearings, especially in view of the elasticity of the "for cause" test for continuances.

The statutory prerequisites to judicial approval of rejection may also be expected to contribute significantly to delay. Under H.R. 5174, the court may not approve rejection of a collective bargaining agreement until the trustee complies with his statutory obligations. Thus, H.R. 5174 requires the trustee to confer in good faith with the union and provide financial information relevant to determining whether a collective bargaining agreement may be rejected. The trustee may file a motion to reject a collective bargaining agreement only if he has proposed to the union modifications deemed necessary for a successful reorganization and preservation of jobs and has considered alternative proposals advanced by the union. H.R. 5174 further requires that relevant financial information be provided the union under conditions prescribed by the court. Financial information "relevant" to the determination of the propriety of rejection may obviously be voluminous and require weeks, if not months, to digest. The proposed legislation presumably contemplates that the union will have adequate opportunity to review the financial information and to negotiate with the trustee concerning alternatives to rejection. Accordingly, a motion to reject may be delayed for a very substantial length of time.

The difficulties with the proposed legislation do not end with the potential for delay. As suggested above, H.R. 5174 requires the bankruptcy court to pass on an issue --

i.e., whether the trustee has complied with its obligation to confer in good faith with the union -- that is plainly outside its expertise. Indeed, a unanimous Supreme Court relieved the debtor of the obligation to bargain to "impasse" before seeking rejection, in part, because of the undesirability of asking the bankruptcy judge to rule on issues (i.e., the existence of an impasse) wholly outside his area of expertise. If a bankruptcy judge lacks the expertise to determine whether the parties have reached an "impasse," we submit that he is equally incapable of determining whether they have negotiated "in good faith."

Finally, proponents of the legislation contend that the ability to act unilaterally will destroy collective bargaining -- a view that the NLRB itself has rejected. In Century Printing Co., 242 N.L.R.B. 659, 669 (1979), the NLRB concluded that a receiver-trustee in bankruptcy lawfully disaffirmed the bankrupt's collective bargaining agreement, effective the date of his letter of repudiation to the union, and that the employer was thereafter not required to apply the terms of the repudiated agreement. In so concluding, the NLRB rejected the contention that repudiation of the contract was not valid until expressly approved by the bankruptcy court.10/

10/ In Century Printing, the NLRB concluded that the court's subsequent discharge of the bankrupt constituted an "implied" approval of the trustee's conduct which, even though never expressly authorized by the court, operated to foreclose an 8(a)(5) violation based on a post-disaffirmance refusal to apply the collective bargaining agreement.

IV. CONCLUSION

Proponents of H.R. 5174, or similar legislation, have not pointed to a single instance in which an employer has invoked the bankruptcy laws for the purpose of ridding itself of the union or of labor agreements.[11] Wilson's experience confirms that a resort to Chapter 11 reorganization is scarcely antithetical to collective bargaining; indeed, Chapter 11 enabled Wilson to renegotiate labor contracts, continue operations and preserve thousands of jobs. Nothing in the current record suggests that absent enactment of the proposed legislation, employers will abuse Chapter 11 and casually file bankruptcy petitions to abrogate their labor contracts. Accordingly, the proposed legislation is simply an unnecessary, perhaps emotional reaction to a Supreme Court decision whose impact will be far narrower than organized labor claims.

In any event, the current law contains ample safeguards against perceived abuses of Chapter 11. As discussed previously, the most important safeguard is that employers do not casually delegate control of their businesses

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11/ The increase in bankruptcy filings in recent years has affected union and nonunion employers alike and may be attributable to several factors -- e.g., technological advances, changes in consumption patterns and import competition -- unrelated to the desire to escape expensive collective bargaining agreements.

to a bankruptcy judge and creditors' committees. As the experience of Continental Airlines and Wilson Foods indicates, a filing also tarnishes the debtor's image and jeopardizes its relationship with customers, suppliers, creditors, and investors.

In addition, a debtor may not invoke Chapter 11 simply for the purpose of ridding itself of union contracts. As the Supreme Court noted, a bankruptcy judge may not approve a petition to modify or reject a labor contract unless persuaded of the debtor's reasonable efforts to negotiate a voluntary modification. Moreover, under current law, the debtor has a continuing obligation after a bankruptcy petition is filed to bargain collectively with the union over the terms of a new contract -- and the union can still deploy its strike weapon against a recalcitrant company.12/ Finally, the employer is still required under the "balancing of equities" approach to demonstrate financial exigency and the employees still have a claim under the Bankruptcy Code for wages and benefits.

Respectfully submitted,

WILSON FOODS CORPORATION

12/ The Norris-LaGuardia Act does not permit a bankruptcy court to enjoin a strike against an employer invoking the protections of Chapter 11. See, e.g., International Brotherhood of Teamsters v. Quick Charge, Inc., 168 F.2d 513 (10th Cir. 1948).

Statement of George W. Lehr, Executive Director
# of the
Central States, Southeast and Southwest Areas
Pension Fund

on

Rejection of Union Contracts
in Bankruptcy Reorganizations

Joint Hearing before the
Senate Committee on the Judiciary
and the
Senate Committee on Labor and Human Resources

April 11, 1984

Mr. Chairman and Members of the Committees, I am pleased to present this Statement in my capacity as Executive Director of the Central States, Southeast and Southwest Areas Pension Fund (hereinafter referred to as the "Fund").*/

The Fund is among the largest multiemployer Taft-Hartley trust funds in the country, serving approximately 467,000 active, inactive vested and retired participants and their beneficiaries in 40 states. It receives contributions from approximately 13,000 Teamster industry employers pursuant to collective bargaining agreements. The Fund is administered by an eight man Board of Trustees, the members of which are selected and appointed by labor organizations and management associations.

I have carefully studied the bankruptcy bill recently passed by the House, H.R. 5174, as well as S. 2462, filed on March 22 by Senator Kennedy. I believe that proposed new Section 1113, which these bills would add to Title 11 of the United States Code, would provide important guidance and clarification as to the circumstances under which a collective bargaining agreement could be rejected in a bankruptcy case under Title 11. The standard set forth in this legislation is an appropriate and much needed response to the confusion generated by the Supreme Court's recent decision in NLRA v. Bildisco & Bildisco, _______ U.S. ____, 52 U.S.L.W. 4269 (February 21, 1984). The Fund applauds this effort to fairly and properly accomodate both labor and bankruptcy policies.

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*/ The comments and recommendations herein also apply, where applicable, to the Central States, Southeast and Southwest Areas Health and Welfare Fund.

The bills would also modify Section 503(b)(1)(A) of Title 11 to specify that "wages or salaries covered by a collective bargaining agreement" which are paid as an administrative expense in bankruptcy would be paid at the rate prescribed for such services in the collective bargaining agreement. While I support this provision, I feel that it should be expanded to encompass total compensation, particularly contributions to any retirement or health and welfare plan specified by the operative collective bargaining agreement.

In this connection I would propose that Section 503(b)(1)(A) of Title 11 be modified to read as follows:

> (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, contributions to employee benefit plans, or commissions for services rendered after the commencement of the case, except that such wages, salaries and contributions to employee benefit plans covered by a collective bargaining agreement to which section 1113 of this title applies shall only be measured at the rate prescribed for such items in such agreement.

With this minor modification, I support the proposed legislation. I feel that legislation such as S. 2462 and H.R. 5174 would undo the harm created by the Bildisco decision. Such legislation would reaffirm basic principles of our nation's labor laws and the collective bargaining process. While it would permit the rejection of collective bargaining agreements under certain circumstances, it would prevent unscrupulous companies from arbitrarily and capriciously escaping from collective bargaining agreements negotiated in good faith.

As testimony before numerous Senate and House Committees amply demonstrates, the loss of employer contributions to multiemployer pension plans is a serious problem. Loss of additional contribution income threatens the long-term soundness of multiemployer plans, which must contend with a stable but ever-aging participant base and, in many cases, a declining employer base. Unilateral rejection of collective bargaining agreements would result in a very real loss to multiemployer plan participants.

It is my experience that many companies on the verge of bankruptcy view the possibility of rejecting their collective bargaining agreements as an invitation to terminate their multiemployer pension plan obligations. Often, the employees of such a company will have accrued benefits in excess of the funding provided to date by the employer. In these circumstances, a multiemployer plan must impose and attempt to collect withdrawal liability payments. The added expense of such efforts is quite burdensome. If the trustees cannot collect such withdrawal liability payments, the added the added cost of providing for the bankrupt employer's unfunded liability must be apportioned among the other employers in the plan. While I recognize that collective bargaining agreements must sometimes be renegotiated in the context of Chapter 11 filings, I strongly oppose Bildisco's holding that an employer may unilaterally reject such contracts, and thereby escape its future pension obligations.

Mr. Chairman, this concludes my prepared statement. I greatly appreciate the opportunity to submit this statement for the record and wish to commend the Committees for their keen interest in improving the administration of an area of law of such vital importance to millions of Americans including active and inactive workers and retirees and their beneficiaries.

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EXECUTIVE DIRECTOR
[illegible]

April 19, 1984

The Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
Washington, DC 20510

Dear Senator Thurmond:

This responds to your letter of April 12, 1984, inviting us to submit answers to five questions propounded by Senator Joseph Biden in connection with the joint hearings of the Committee on the Judiciary and the Committee on Labor and Human Resources on the Bildisco issue.

1. What considerations should the court examine in "balancing the equities?" What are the needs of the debtor, creditors and the company's employees that need to be taken into consideration?

Answer: "Balancing the Equities" in our view means that employees should not be called upon to make disproportionate sacrifices relative to owners of the business, managerial and supervisory employees, and creditors in order to promote a successful reorganization. The debtor needs sufficient operating cash to keep the business running; employees need wages which are sufficient to provide them with a decent standard of living and give them enough incentive to put forth their best productive efforts; and creditors need sufficient assurances of fair treatment so that they will continue to provide necessary goods and services to the business.

2. What kind of good faith negotiations should a debtor enter into with its employees to insure the welfare of the employees and the company, at least in the short term?

Answer: The debtor should explain to the employees' collective bargaining representative what modifications in the labor agreement should be made to materially improve the chances for a successful reorganization, why these modifications are required, and what adverse financial consequences are being imposed on others. The debtor should be prepared to listen to and carefully consider with an open mind counterproposals submitted by the union. The debtor should be further prepared to justify its own proposals as well as rejection of union counterproposals on a reasoned basis. The

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debtor should also be willing to devote adequate time and attention to meeting and conferring with the union, recognizing, however, that the need for speedy action may require a highly compressed schedule.

3. Would it be appropriate to ask the bankruptcy court to consider two different standards - - one on a very short-term emergency basis and one as part of the affirmation of a plan of reorganization? If so, how should these standards differ?

Answer: A two-step procedure would appear to be workable and to have some merit. However, the standard in each step of the procedure should be essentially the same - - i.e., that set forth by the Supreme Court in Bildisco, specifically whether "the debtor can show that the collective bargaining agreement burdens the estate, and that, after careful scrutiny, the equities balance in favor of rejecting the labor contract." The distinction between the two steps is that, in the first instance, the bankruptcy court is authorized to permit a temporary rejection of the contract because full information on which to base a final decision on rejection is not likely to be available, whereas in the second instance a final determination on whether rejection is to be allowed is made at a later date in light of the proposed plan of reorganization.

4. One or more of the proposals that I have seen allows whatever new standard is passed by Congress to apply to pending bankruptcy cases? What effect would such a provision have?

Answer: We believe any new standard should apply only to bankruptcy filings which are made after the date of the enactment of the Bankruptcy Code amendments. To change rules in midcourse of an ongoing bankruptcy proceeding not only would be unfair and confusing, but also would add to the time and expense of the litigation.

5. It is my understanding that the officials here from Continental Airlines are going to testify that permitting any new standard to apply to cases which already have been filed will cause havoc in that litigation and in the reorganization efforts of that company. Why is your position at odds with the company that is so publicaly identified with the issues involved in this hearing?

Answer: As indicated above, in response to question 4, our position is not at odds with that of Continental Airlines. Our position, however, was formulated independent of the Continental Airlines case, and we express no view on the merits of that case.

I hope that the foregoing will be helpful to the two Senate Committees which are considering the Bildisco issue. Thank you for giving us this additional opportunity to state our views.

Sincerely,

Herbert Liebenson

Herbert Liebenson
Executive Director

HL:sv

NAM
National Association
of Manufacturers

ALEXANDER B. TROWBRIDGE
President

April 19, 1984

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate

Dear Strom:

Thank you for your letter concerning the hearings on the Supreme Court's Bildisco decision. Enclosed are our responses to the questions submitted to you by Senator Biden.

As you know, the labor provisions of H.R. 5174 are a matter of serious concern to our membership and we appreciated the opportunity to participate in the hearings. I trust you will call upon us if we may assist further in bringing about a resolution to the current situation. In the interim, we will continue to work with Committee staff toward that end.

With warmest regards,

Sincerely,

AB Trowbridge

NAM Responses to Senator Biden's Questions

QUESTION - WHAT CONSIDERATIONS SHOULD THE COURT EXAMINE IN "BALANCING THE EQUITIES?" WHAT ARE THE NEEDS OF THE DEBTOR, CREDITORS AND THE COMPANY'S EMPLOYEES THAT NEED TO BE TAKEN INTO CONSIDERATION?

Answer - In it's decision on Bildisco, the Court indicated the considerations and needs which should be examined.

> Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties -- the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardships each must face.

QUESTION - WHAT KIND OF GOOD FAITH NEGOTIATIONS SHOULD A DEBTOR ENTER INTO WITH ITS EMPLOYEES TO INSURE THE WELFARE OF THE EMPLOYEES AND THE COMPANY, AT LEAST IN THE SHORT RUN?

Answer - It is clear from the Court's decision that good faith negotiations in the context of a Chapter 11 Reorganization are different from those under the NLRA. The Supreme Court unanimously held that:

> [T]he Bankruptcy Court should be persuaded that reasonable efforts to negotiate a volutary modification have been made and are not likely to produce a prompt and satisfactory solution... The court need not determine that the parties bargained to impasse."

A uanimous Court specifically rejected the contention of the need for full compliance of §8(a)(5) and §8(d) (of the NLRA) procedures and noted that those provisions must "be subordinated to the exigencies of bankruptcy."

We believe the Court's definition of good faith bargaining, as set forth above, provides sufficient guidance as to what constitutes good faith bargaining.

QUESTION - WOULD IT BE APPROPRIATE TO ASK THE BANKRUPTCY COURT TO CONSIDER TWO DIFFERENT STANDARDS — ONE ON A VERY SHORT-TERM EMERGENCY BASIS AND ONE AS PART OF THE AFFIRMATION OF A PLAN OF REORGANIZATION? IF SO, HOW SHOULD THOSE STANDARDS DIFFER?

Answer - On the assumption that the two tests would apply to ultimate rejection. NMA believes that a two-standard approach would be impractical because it would likely lead to inconsistent determinations by the bankruptcy courts and because of the intolerable uncertainies for the debtor.

QUESTION - ONE OR MORE OF THE PROPOSALS I HAVE SEEN ALLOWS WHATEVER NEW STANDARD IS PASSED BY THE CONGRESS TO APPLY TO PENDING BANKRUPTCY CASES? WHAT EFFECT WOULD SUCH A PROVISION HAVE?

Answer - Retroactive application would changes the rules in mid-stream and in our judgement, be fundamentally unfair and inequitable. In making any decision, whether on an investment or in bankruptcy, businessmen, like others, need a degree of certainty that the laws and regulations in effect when a decision is made will not be changed or at a minimum, will not be applied retroactively. Further, retroactive application of a new conditions might very well threaten the success of pending reorganizations and lead to unwarranted dissapation of debtor resources if relitigation of issues in accordance with a modified set of standards or conditions were required.

QUESTION - IT IS MY UNDERSTANDING THAT THE OFFICIALS HERE FROM CONTINENTAL AIRLINES ARE GOING TO TESTIFY THAT PERMITTING ANY NEW STANDARD TO APPLY TO CASES WHICH ALREADY HAVE BEEN FILED WILL CAUSE HAVOC IN THAT LITIGATION AND IN THE REORGANIZATION EFFORTS OF THAT COMPANY. WHY IS YOUR POSITION AT ODDS WITH THE COMPANY THAT IS SO PUBLICLY IDENTIFIED WITH THE ISSUES INVOLVED IN THIS HEARING?

Answer - As noted in our response to the previous question, NAM's position on retroactive application is not at odds but is consistent with that of Continental Airlines. Further, we understand from Senator Hatch's remarks during the hearing that in any event, as courts of equity, the bankruptcy court would retain the power to avoid results which are fundamentally unfair to any debtor.

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April 11, 1984

James M. Stephens
United States Senate
SD-424 Dirksen Building
Washington, D.C. 20510

Dear Jim:

Enclosed are my initial responses to the written questions of Senator Hatch which you handed to me on Monday. I regret that my travel schedule and your deadlines have required me to dictate these answers and cause them to be sent off before I could review the typed product. The answer number corresponds to the number on the questions which are enclosed.

Paragraph #1: I do not recall from my experience on the bench an instance where labor or management demonstrated bad faith toward the other. Management's goals were aimed at preserving the going concern value of the company by financial reorganization. Labor's goals were to either preserve jobs or preserve the integrity of multi-employer contracts. I should add that not infrequently management was concerned for its own jobs. The so-called "bad faith" filings seemed to predominate, not in the labor-management context, but in the real estate investment tax shelter limited partnership context.

Paragraph #2: I do not foresee the possibility that the union's fears of additional filings resulting from Bildisco will be realized. It is simply too risky to file under Chapter 11 absent dire financial circumstances: The court may appoint a trustee to oust management from the business entirely (as happened in the IML case); creditors may successfully move to liquidate the company - - particularly if the company is solvent and thus creditors would be paid off in liquidation; almost invariably management will lose ownership of the company in Chapter 11 through sale or dilution of stock in the course of reorganization (in an insolvent enterprise, the creditors have the right to take all of the stock); the risks of seeking to reject a labor contract and failing because one's circumstances were not severe enough is very costly and possibly catastrophic. Furthermore, the Bildisco decision, in my view, is not a radical departure from the law as it has been (except in the 2nd Circuit, perhaps), and thus any stampede to the courts would be based more on perceived benefits than on actual benefits.

Paragraph #3: I don't recall ever encountering a business debtor which did not require some immediate financial relief. The immediate relief typically included the ability to use collateral of secured creditors without paying for its use, the ability to stop making payments to unsecured creditors, the ability to use "cash collateral" of secured creditors in order to operate the business, the protection from foreclosure and collection lawsuits, and the ability to suspend executory contracts. As respects executory contracts, it is my experience and knowledge that if a company receives some other financial relief such as I've outlined, it may survive briefly without labor contract rejection. Typically, I believe, 30 to 60 days is too long for at least some interim relief although I recall the American Strevell case in which relief from a collective bargaining agreement was not urgent and deliberations could proceed leisurely. I also recall an unionized paint contractor whose rejection hearing was expedited, but not urgent (and, incidentally, against whom I ruled). As I earlier testified, the typical troubled business waits so long before filing Chapter 11 that the end is at hand unless some immediate relief can be obtained.

Paragraph #4: Yes, I believe it is feasible and I believe that bankruptcy courts can be expected to meet strict time limits on collective bargaining agreement rejections. The strict time limits would have to be embedded in law, would need to be straightforward, and would need to be as self-operating as possible. Examples of mechanisms already existing in the Bankruptcy Code include the following. Under §362(d) and (e) once a creditor requests that the automatic stay be lifted to allow him to take action against the debtor's property in which he has security, the court must hold a hearing within thirty days or else the relief is automatically granted. Under §363(c)(3), the court must hold a hearing promptly and at the debtor's convenience. Under §§363 and 364, once the court approves post-petition financing or a sale of property, the transaction is final and cannot be attacked even on appeal unless a stay pending appeal is obtained and, usually, a bond is posted. More than any other court in my experience, the bankruptcy court is accustomed to holding emergency and expedited hearings and is accustomed to making significant rulings based upon the best evidence available under the circumstances. Naturally, any mechanism intended to avoid dilatory tactics should be simple, inexpensive, and should not require a party to visit every court on the block in order to obtain a conclusive decision.

Paragraph #5: Upon filing a Chapter 11 petition, a debtor company receives immediate concessions from unsecured creditors (who no longer need to be paid according to their contracts and who are required to give up the accrual of interest), secured creditors (who ordinarily no longer need to be paid according to the terms of their contract and who may be obligated to give up interest), and from contracting parties who have already performed their side of the bargain but who are awaiting the debtor's performance (the debtor can simply not perform), landlords (who may not receive their rent), and the like. But in my experience, the negotiation of permanent concessions and the negotiation of the nature of the reorganization do not occur immediately and take much time and effort. Under the Bankruptcy Code, the debtor usually has 120 days' exclusive right to propose a plan and 180 days to obtain acceptances for that plan. Typically, parties in interest do not consent to a final "haircut" until the plan of reorganization has taken shape. In some instances, an arrangement may have been negotiated even before Chapter 11 is filed but such an arrangement is usually based on extensive negotiations as well. I think it is impractical to effectuate a reorganization plan at the bargaining table.

Very truly yours,

Ralph R. Mabey by B.H. Secy

Ralph R. Mabey

RRM/bh
Enclosure

QUESTION TO JUDGE MABEY

QUES: JUDGE, IN YOUR EXPERIENCE ON THE BENCH, DID YOU EVER RUN ACCROSS INSTANCES WHERE EITHER LABOR OR MANAGEMENT DEMONSTRATED CONDUCT WHICH MIGHT BE MOTIVATED BY BAD FAITH EFFORTS TO GET AN ECONOMIC EDGE OVER THE OTHER PARTY? ①

QUES: BASED ON YOUR EXPERIENCE, DO YOU FORESEE THE POSSIBILITY THAT THE FEARS OF THE UNIONS MAY BE CONFIRMED? . . . IN OTHER WORDS, WILL EMPLOYERS, ESPECIALLY THOSE WHO HAVE HOSTILE RELATIONS WITH THE UNION, HAVE AN INCENTIVE UNDER BILDISCO TO RUSH TO BANKRUPTCY COURT NOT TO RID ITSELF OF THE UNION BUT TO RID ITSELF OF A BURDENSOME UNION CONTRACT? ②

JUDGE MABEY

JUDGE, THE BUSINESS COMMUNITY SUPPORTS UNILATERAL REJECTION IN THE INTEREST OF TIME. IT CONTENDS THAT IN MANY CASES "TIME IS OF THE ESSENSE," REQUIRING PROMPT IMPLEMENTATION OF COST-SAVING MEASURES.

③ QUESTION: DURING YOUR TENURE ON THE BENCH, HOW OFTEN DID YOU ENCOUNTER DEBTORS IN SUCH *IN EXTREMIS* CONDITION UPON INITIATING CHAPTER 11 PROCEEDINGS THAT THE DEBTOR COULD NOT WAIT 30-60 DAYS TO IMPLEMENT FINANCIAL CHANGES, INCLUDING CONTRACT REJECTION?

QUESTION TO JUDGE MABEY (CONT'D)

JUDGE MABEY, IT HAS BEEN SUGGESTED THAT BILDISCO COULD BE MODIFIED BY (1) PROHIBITING UNILATERAL REJECTION, AND (2) AS A MEANS OF PREVENTING DILATORY TACTICS, MANDATING AN EXPEDITIOUS HEARING ON THE ISSUE OF REJECTION, WITH STRICT TIME LIMITS IMPOSED FOR RULING ON REJECTION.

④

QUESTION: IS THIS FEASIBLE? . . . CAN WE EXPECT BANKRUPTCY COURTS TO ACTUALLY ABIDE BY THE TIME LIMITS IMPOSED IN CONNECTION WITH REORGANIZATION PROCEEDINGS? . . . IN OTHER WORDS, IS IT REASONABLE TO EXPECT BANKRUPTCY COURTS TO MEET STRICT TIME LIMITS WHEN RULING ON REJECTION?

QUESTION TO JUDGE MABEY

⑤ ONE OF THE RECOMMENDATIONS OF THE TEAMSTERS IS THAT THE DEBTOR SHOULD BE REQUIRED TO OBTAIN THE PARICIPATION OF OTHER CREDITORS AS A PREDICATE TO THE COURT APPROVING A LABOR CONTRACT REJDCTION. IN OTHER WORDS, THE PARTIES SHOULD ATTEMPT TO EFFECTUATE A REORGANIZATION PLAN AT THE BARGAINING TABLE, RATHER THAN THE NORMAL CONTEXT OF REORGANIZATION PROCEEDINGS.

QUESTION: AS PRACTIONER(S) IN THE BANKRUPTCY COURT, COULD YOU TELL THE COMMITTEES WHETHER THIS IS A FEASIBLE IDEA? . . . IN OTHER WORDS, WHAT INCENTIVES ARE LOST IN TRYING TO ACCELERATE OR COMPRESS THE REORGANIZATION EFFORTS?

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April 12, 1984

James M. Stephens, Esq.
Labor Counsel
United States Senate
  Committee on Labor &
  Human Resources
SD-424 Dirksen Building
Washington, D.C. 20510

Re: April 10, 1984 Hearings Regarding
Labor Contract Rejection in
Chapter 11 Proceedings

Dear Jim:

Enclosed please find responses to the written questions which you gave me at the end of Tuesday's hearing for insertion into the hearing record.

I assume that when page proofs of the hearing are provided to the committee staff, copies will be forwarded to us for corrections.

If I can be of any further assistance to you or Senator Hatch on this issue, do not hesitate to call.

Sincerely yours,

Daniel M. Lewis

Enclosure

WRITTEN QUESTIONS FOR INSERTION IN TESTIMONY OF DANIEL M. LEWIS AT THE APRIL 10, 1984 TESTIMONY BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

Senator Hatch: Mr. Lewis, in October you published an article in the Legal Times on the Bildisco problem. You noted a recent decision of the Rhode Island bankruptcy court (In re Blue Ribbon Transportation). You stated:

> "This case raises a cogent issue under the Bildisco standard: if the extraordinary step of rejecting a labor agreement is being taken, the sacrifices of management -- as well as employees, creditors and equity holders -- should be considered."

In that case, as I understand, the bankruptcy court conditioned rejection upon management making simultaneous "sacrifices." Do you think that the Blue Ribbon court's approach is a fair one?

Mr. Lewis: Certainly it was a reasonable one given the circumstances of that case, in which the company was quite small, the employees were asked to make extraordinary sacrifices at the same time that benefits of a personal nature were being given to the corporate officers who were also the owners of this closely held company.

Such a consideration by the court of mutual sacrifices by all constituent groups in a Chapter 11 proceeding is most appropriate under the Bildisco standard, which involves a balancing of the equities. Under the REA Express standard, on the other hand, which focuses on the impact of rejection on the feasibility of a successful reorganization, such a consideration would appear to be less relevant.

No matter what the standard for rejection is, however, I think this question of management "sacrifices" is certainly something that a bankruptcy court judge would consider when deciding whether or not to approve a contract rejection. Any management of a debtor-in-possession would be well advised, before seeking contract rejection, to make sure that overhead costs and management benefits are appropriate under the circumstances. Of course, as I pointed out in my article, compensation for management under the extraordinarily difficult circumstances of a Chapter 11 reorganization, particularly for large companies, would have to be sufficient to attract highly qualified individuals.

Senator Hatch: Is there a feasible way by which this mutual sacrificing can be realized by the parties, at the bargaining table, before the court is asked to strike the balance?

Mr. Lewis: Certainly, if good faith bargaining takes place prior to the filing of a motion to reject a labor contract, this issue could be raised by labor and could be resolved by labor and management. To the extent it is not resolved, it would certainly be the subject of comment by the union's attorneys at a hearing on a motion to reject the labor agreement.

Of course, the union representatives will also be concerned about the appropriateness of sacrifices from other groups involved in the reorganization proceeding -- the trade creditors, the secured creditors, any bond or debenture holders, and the equity holders. To a certain extent, sacrifices by these groups have begun automatically on the filing of a Chapter 11 petition. If collateral is not adequate to cover debts to the secured creditors, they will be losing interest. They have lost their right, at least for some time, to recover their collateral. Interest payments to all other unsecured creditors will not be made on their claims for the duration of the Chapter 11 proceeding. Moreover, in most situations it is inevitable that unsecured creditors and equity holders will have to substantially compromise their claims in any successful reorganization. Nonetheless, labor unions will want to be reassured that the sacrifices they are being asked to make, as future employees of the debtor, are in proportion to the sacrifices of others.

Unfortunately, due to the timing of a Chapter 11, it is not easy to give such assurances, at least in detail. As I referred to earlier, and at greater length in my written testimony, usually it is important that contract rejection occur early in a Chapter 11 case for several reasons: First, to reduce operating costs during the Chapter 11; second, to provide a feasible business plan in order to shape a plan of reorganization; third, as a means of obtaining reasonable sacrifices from trade creditors, secured creditors and other constituent groups; and fourth, in many cases, as a necessary prerequisite to obtaining outside investment in the reorganized company. With such early timing, it is impossible at the bargaining table or even at a hearing on contract rejection to compare in detail the sacrifices which labor is making at that time with the sacrifices that the other groups will be making in the future as part of the plan of reorganization.

Nonetheless, given the broad outlines of the financial structure of the company and its early plans for reorganization, informed estimates of the relative sacrifices to be made by the various groups can in many cases be given. In addition, in many circumstances the employees, as unsecured creditors, will play a large part in the voting process for approval of a plan of reorganization and, if their sacrifices are disproportionate, may be able to block approval of a plan of reorganization. As I stated earlier, negotiating a successful plan of reorganization is largely a consensual process.

Finally, if it appears to labor that their sacrifices are disproportionate, they could seek to modify the extent to which they have made sacrifices. This could be accomplished in a number of ways: allowing contested Section 507(a)(3) priority wage payments being sought by such workers; permitting larger general unsecured claims to these workers; or providing such workers with a larger portion of equity in the reorganized debtor. Another approach would be to hold open the final labor contract settlement reached after a rejection, until the major outlines of a plan of reorganization are better known, or to permit labor to reopen contract negotiations -- if a new labor contract has been signed -- if certain criteria regarding the sharing of Chapter 11 burdens are not met.

I think that creative minds can provide assurances to labor that they will not be alone in making sacrifices to sustain the debtor.

The **Chairman**. In that regard, we will recess this hearing until further notice, and we are hopeful that we can come up with a compromise that will resolve it. Thank you.

[Whereupon, at 5:15 p.m., the committees recessed, to reconvene at the call of the Chair.]

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